Supreme Court, U. S.
FILED
AUG 29 1974
MICHAEL RODAK, JR., CLERK

No. 74-204

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

GEORGE H. ELDRIDGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–2A) is reported at 493 F. 2d 1230. The opinion and order of the district court (App. B, *infra*, pp. 3A–18A) is reported at 361 F. Supp. 520.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1974. On July 1, 1974, Mr. Chief Justice Burger extended the time for filing a petition for a

writ of certiorari to and including August 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether administrative procedures governing the termination of Social Security disability benefit payments, under which, prior to termination, a beneficiary is given a summary of the evidentiary basis for the proposed termination and an opportunity to submit additional evidence and a written rebuttal, but not an oral hearing, are constitutional.

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

The pertinent regulations of the Department of Health, Education and Welfare, contained in the Disability Insurance State Manual ("DISM"), are set forth in Appendix C, *infra*, pp. 19A–75A.

STATEMENT

The facts are not in dispute and are set forth in the opinion and order of the district court (App. B, *infra*, pp. 4A–6A). Respondent George Eldridge, a resident of Virginia, applied for and was awarded Social Security disability benefits beginning in June 1968. The notice of the award of benefits advised him that his claim would be reexamined because of possible medical improvement, and that his benefits would be terminated if such review showed he was no longer disabled.

Respondent's disability entitlement was reviewed for possible medical improvement in early 1972.[1]

In response to a questionnaire from the Virginia state agency,[2] respondent indicated that his condition had not improved. The state agency also received medical reports from his personal physician and from a psychiatric consultant who had examined him. On May 16, 1972, respondent was advised by the state agency as follows:

> We previously informed you that we were asked by the Social Security Administration to help determine whether your impairment still prevents you from working. Although you indicate on the report you recently completed for us that you do not feel your condition has improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work, and have been since May, 1972.
>
> You were initially found to be disabled due to chronic anxiety and back strain. In addition

[1] In February 1970, following medical review of respondent's disability entitlement, the Social Security Administration determined that his disability had ceased as of the prior month. Accordingly, under procedures in effect at that time, his benefits were suspended. Respondent requested reconsideration in April 1970 and, five months later, brought suit seeking an administrative hearing prior to suspension of benefits. The district court ordered that payment of benefits be continued pending action on his claim. In April 1971, following an administrative hearing, respondent's disability was found not to have ceased. Thereafter, the district court dismissed his action as moot (Pet. App. B, *infra*, p. 4A).

[2] Pursuant to 42 U.S.C. 421, initial determinations as to whether or when a claimant became disabled, and whether or when a beneficiary's disability ceased, are made by a state agency.

you have been found to have diabetes. Medical evidence shows no significant motion limitation of your back which would impose severe functional restrictions. Diabetes is under control and no complications have been noted, secondary to this. Although you remain somewhat anxious, there is no indications [sic] of continued emotional problems of sufficient severity to preclude all work for which you are qualified.

Therefore, disability benefits being paid on your social security number may be stopped unless additional evidence is submitted which shows that you are still unable to work because of your impairment.

If you have additional information you want us to consider, please let us know immediately, using the enclosed envelope; a reasonable additional amount of time will be granted where necessary for you to obtain and submit additional evidence. If we do not hear from you within ten days, we will forward your records to the Social Security Administration and when a formal decision is made you will be notified.

Under the Social Security Law, benefits may be paid for a three-month period of adjustment. This period includes the month in which you have a regained ability to work and two additional months.

By letter of May 25, 1972, respondent advised the state agency that it already had enough evidence on file to prove his disability and that it should proceed with the decision.

In June 1972, acting pursuant to 42 U.S.C. 423(a)(1)(D), the Bureau of Disability Insurance of the Social Security Administration approved the state

agency's determination that respondent's disability had ceased as of May 1972 and that his benefits would accordingly terminate after July 1972.[3] On July 7, 1972, respondent was notified of this initial determination, and advised of his right to request reconsideration within six months.

Rather than seek reconsideration, respondent instituted the present action on August 3, 1973, seeking a declaration that the administrative procedures established by the regulations were unconstitutional and an injunction requiring the Secretary to continue paying respondent benefits until he is afforded an oral evidentiary hearing concerning the cessation of his disability. The Secretary moved to dismiss on the ground that respondent's benefits had been terminated pursuant to lawful regulations that do not violate due process. On February 13, 1973, the district court ordered respondent's benefits reinstated pending its final disposition of the case on the merits.

On April 9, 1973, the district court held that the administrative procedures under which respondent's benefits were terminated without a prior oral hearing were unconstitutional (App. B, *infra,* pp. 6A–18A). The court noted that the only issue to be resolved was whether such procedures satisfy the minimum requirements of due process, there being no dispute that the termination of respondent's benefits fully complied with the applicable procedure. The court ruled that, in terms of the recipient's interest in

[3] Under the Social Security Act (42 U.S.C. 423(a)(1)(D)), benefit payments are not actually terminated until two months after the month in which disability is found to have ceased.

avoiding, through pre-termination evidentiary hearings, an erroneous loss of benefits, the termination of Social Security disability benefits is indistinguishable from the termination of state of welfare benefits involved in *Goldberg* v. *Kelly*, 397 U.S. 254, and *Wheeler* v. *Montgomery*, 397 U.S. 280 (App. B, *infra*, pp. 8A–10A). The court further ruled that, because disability determinations may involve subjective judgments in resolving conflicting medical evidence and are not exclusively based upon "objective" medical evidence, a due process standard different from that required by *Goldberg* v. *Kelly* for termination of welfare benefits is not justified for termination of Social Security disability benefits (*id.* at 10A–13A). Accordingly, the court remanded the case to the Secretary for the payment of disability benefits and for further proceedings not inconsistent with the court's opinion (*id.* at 18A).

The court of appeals affirmed on the opinion of the district court (App. A, *infra*, p. 2A).

REASONS FOR GRANTING THE WRIT

1. In 1971 Term, in *Richardson* v. *Wright*, 405 U.S. 208, the Court had before it the question whether the procedural requirements held applicable to termination of state welfare benefits in *Goldberg* v. *Kelly*, *supra*, and *Wheeler* v. *Montgomery*, *supra*, also applied to the termination of federal disability benefits. Resolution of that question was aptly described as being "vitally essential to the administration of an important Government program * * *." *Id.* at 214 (Brennan, J., dissenting). Because the procedures under challenge there had been substantially revised by the Secretary while the case was pending in this Court, the Court vacated the judgment of the district court (which had held the superseded procedures unconstitutional) and remanded the case to the Secretary for reprocessing under the new regulations, with the observation that "[i]n the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." *Id.* at 209.

The evolutionary process under way in 1972 has been completed,[4] and the question presented in *Wright* is now ripe for decision. Moreover, further guidance from this Court at this time would greatly assist the government in its continuing efforts to find procedures that are fair and that work efficiently and effectively in delivering to eligible recipients as benefits, rather than expending as administrative costs, the maximum amount of the limited resources available for such programs.

2. A decision by this Court as to the constitutionality of the challenged procedures is still "vitally essential" to the Secretary's administration of the Social Security disability benefit program and other programs.

Under the current administrative procedures governing the termination of Social Security disability benefits, the Secretary presently terminates the bene-

[4] The procedures now in effect differ substantially from those challenged in *Wright* with respect to terminations based on both return to work and medical recovery. Compare 405 U.S. at 213, n.2.

fits of approximately 87,600 disability beneficiaries (and their dependents) each year because their disabilities are found to have ceased. Of these terminations, fewer than 2,400 per year proceed to the post-termination oral evidentiary hearings provided under current procedures.[5] In the Secretary's judgment, the court of appeals' holding that *Goldberg* v. *Kelly, supra,* requires that disability beneficiaries be afforded oral evidentiary hearings prior to termination,[6] if allowed to stand, will severely tax the capacity of the Social Security Administration to conduct an effective disability pogram,[7] and will result in substantial

[5] These annual termination and hearing rates are estimates of the Social Security Administration based on data available through July 1974.

[6] On the basis of the decision in the instant case, the disability benefit termination procedures were also held unconstitutional in *Williams* v. *Weinberger*, 494 F. 2d 1191 (C.A. 5), in which a petition for a writ of certiorari is also being filed.

[7] A requirement of pre-termination oral hearings would be likely to result in a significantly increased number of requests for hearings, since a beneficiary would thereby be able to force continued payment of benefits. This likelihood is underscored by the states' experience after this Court's decision in *Goldberg* v. *Kelly*, *supra*, decided in March 1970: according to the Social Security Administration, welfare recipients' requests for hearings, which that case required before the termination of benefits, increased from 19,400 during the January-June 1970 period to 67,167 during the July-December 1971 period. (The number of requests for hearings has since continued to increase, but at a decreased rate.) To accommodate promptly the increased numbers of pre-termination disability hearings that would probably be requested, so as to minimize the amount of benefits that would have to be paid until completion of the hearing process, the corps of Social Security administrative law judges would have to be substantially augmented. But, aside from the added expense, such an expanison of personnel would be difficult to achieve, for the Social Security Administration has serious difficulties in finding sufficient qualified individuals willing to fill even its current needs. The result for the indefinite future would be an over-burdening of existing personnel and a concomitant decrease in the effective administration of the disability program.

losses to the Social Security trust fund.[8] Furthermore, since procedures similar to those governing disability benefit terminations are also used in reducing or suspending disability benefits in order to recoup overpayments, and in terminating, reducing, or suspending old age and survivors insurance benefits,[9] the adverse

[8] The Social Security Administration estimates that the cost per year—in medical recovery cases alone—of continuing the payment of disability benefits until after oral hearings are held would be $30 million or more. This overpayment of benefits figure was calculated on the assumptions that: (1) beneficiaries would be given 30 days in which to request pre-termination hearings; (2) completion of the hearing process would take another 5 months (based on the average time in 1973 of 151 days between requests for and the holding of post-termination hearings); (3) approximately two-thirds of those whose disability is initially found to have ceased would request a pre-termination hearing; (4) 24,396 pre-termination hearings would be held each year (based on estimated totals for fiscal 1974); (5) the average cost of conducting an oral evidentiary hearing would be $546 (based on such cost as of December 1973); and (6) the average monthly benefits paid to a disability beneficiary and his dependents would be $388 (based on such benefits as of April 1974). The overpayment of benefits figure has been reduced to account for: (1) the recovery by the Administration of benefit overpayments from those beneficiaries able to repay (estimated at one-third based on past experience); and (2) the two months of benefits to which each terminated beneficiary is entitled by law after the month in which his disability is determined to have ceased (*i.e.*, two of the six months assumed necessary for completion of the hearing process would not represent overpayment expense).

[9] The administrative procedures under which the Secretary temporarily reduces Title II benefits without a prior oral hear-

Continued)

impact of the court of appeals' holding threatens other programs administered by the Secretary under Title II of the Social Security Act.[10] The need for this Court to determine the constitutionality of these administrative procedures is therefore plain.

3. The decision of the court of appeals that the current procedures for terminating Social Security disability payments do not provide due process is erroneous, is not compelled by the decision in *Goldberg* v. *Kelly*, *supra*, and conflicts with the principles established in decisions of this Court since *Goldberg* v. *Kelly*.

Under the challenged procedures, prior to the initial award of disability benefits every claimant is advised that, if his condition improves to the extent that he is no longer unable to engage in substantial gainful employment, his benefits will cease. Thereafter, upon receipt by the Social Security Administration of in-

(Continued)

ing in order to recoup overpayments have been held unconstitutional in *Elliott* v. *Weinberger*, 371 F. Supp. 960 (D. Hawaii), appeal pending (C.A. 9, No. 74–1611), and *Mattern* v. *Weinberger*, E.D. Pa., Civ. No. 72–2522, decided April 30, 1974, appeal pending. *Contra*, *Jarbo* v. *Weinberger*, No. 727–73C2 (W.D. Wash), decided November 14, 1973. Similarly, the reduction of survivors' benefits without a prior oral hearing because of their allocation among additional dependents has been held unconstitutional in *Frost* v. *Weinberger*, E.D. N.Y., No. 73–1383, decided May 3, 1974, appeal pending. But see *Knuckles* v. *Weinberger*, 371 F. Supp. 565 (N.D. Cal.), appeal pending (C.A. 9, No. 74–1611) (suit challenging suspension of Title II benefits without prior evidentiary hearing to recoup overpayments held not within mandamus jurisdiction); *Jamieson* v. *Weinberger*, E.D. Pa., Civ. No. 73–585, decided June 17, 1974 (same).

[10] See 42 U.S.C. 401, *et seq.* The disability insurance program

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formation indicating that a beneficiary no longer is disabled, the beneficiary is asked by mail or telephone to verify the information that the Administration has received relating to his disability. At this time, the beneficiary is asked to furnish detailed information regarding his medical condition and work efforts. If wages have been posted to his account, he is asked to verify whether those postings in fact reflect his earnings. Should there be indications that the beneficiary's condition has improved, reports of any recent examinations are obtained from his physicians, and ordinarily he is also examined by a consultant physician. Only after it has been confirmed that a beneficiary has been working full time for a substantial period,[11] has recovered, or has refused to cooperate, will the termination of his benefits be proposed.

Preliminary decisions regarding benefit terminations are made first by the appropriate state agency and then by the Administration's Bureau of Disability Insurance, located in Baltimore, Maryland; in these proceedings the Administration's district offices act in an investigatory capacity. Under the Act, the responsibility for making the initial decision to terminate rests with the state agencies, subject to limited review at this stage by the Bureau of Disability Insurance.

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represents only 3,485,979 beneficiaries and dependents (as of the end of fiscal 1973) out of a total of 29,966,052 Title II beneficiaries (as of April 1974). In April 1974, Title II beneficiaries received over $4 billion in benefits.

[11] The Social Security Act precludes the Secretary from finding disabled, and hence entitled to receipt of disability benefits, any individual who is able, despite an impairment, to engage in substantial gainful activity. See 42 U.S.C. 416(i)(1), 423(d); H. Rep. No. 544, 90th Cong., 1st Sess., pp. 30–31; S. Rep. No. 744, 90th Cong., 1st Sess., p 49.

The initial decision itself generally rests upon verified wage postings to the beneficiary's account over a substantial period of time or upon medical reports indicating that the beneficiary has recovered. The initial decision is not formalized, nor payment of benefits actually stopped, until after the beneficiary has been given both a summary of the evidentiary basis for the proposed termination and a reasonable opportunity to make a written rebuttal and to obtain and submit additional evidence. After making its determination to terminate benefits, the Bureau, upon the beneficiary's request, will reconsider the determination; if the beneficiary is still dissatisfied after such reconsideration, he is then entitled to an oral evidentiary hearing before a hearing examiner.[12] Return to work and medical recovery account for about 95 percent of all disability terminations.

By holding in *Goldberg* v. *Kelly, supra,* that a state could not terminate welfare benefits without providing the welfare recipient a prior oral evidentiary hearing, this Court did not purport to establish procedural requirements applicable as a matter of due process to all terminations of governmental benefits. Rather, the procedural requirements laid down were justified by reference, *inter alia,* to the types of issues and evidence typically involved in welfare termination proceedings and the consequences to the beneficiary if benefits were to be erroneously terminated. That case dealt with beneficiaries who were "'[b]y hypothesis * * * destitute, [and] without funds or assets * * *'" (397 U.S. at 261), so that "the crucial factor in this context—a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264. While some disability benefit recipients may be needy, the hypothesis applied to welfare beneficiaries simply does not apply to disability beneficiaries as a class. The latter may have resources from pre-disability employment, their families, insurance, or other benefit programs, and, if needy, may be eligible for welfare benefits. Cf. *Arnett* v. *Kennedy,* No. 72–1118, decided April 16, 1974, slip op. 6 (Powell, J., concurring); *id.* at 31 (White J., concurring).

Moreover, state welfare termination determinations are frequently triggered by tips, rumors or gossip, so that "credibility and veracity are at issue * * * in many [welfare] termination proceedings * * *" (*Goldberg* v. *Kelly, supra,* 397 U.S. at 269), whereas disability terminations tend to be based upon "routine, standard, and unbiased medical reports," as to which the "specter of questionable credibility and veracity is not present * * *" (*Richardson* v. *Perales,* 402 U.S. 389, 404, 407), or upon comparably objective wage reports and other filings made subject to penalties for false statements. 26 U.S.C. 6674, 7204; 42 U.S.C. 408; see 18 U.S.C. 1001.

The primary purpose of the pre-termination procedural requirements of due process is to "prevent unfair and mistaken deprivations of property * * *

[12] If the initial determination of the Bureau terminating benefits is subsequently reversed and reinstatement of benefits is ordered, corrective back payments are made retroactive to the date of initial termination.

'by [providing] the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity, of the underlying claim * * *.'" *Fuentes* v. *Shevin*, 407 U.S. 67, 97; cf. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 266–267. The risk of wrongful action, however, "must * * * be judged in the context of the issues which are to be determined * * *." *Mitchell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974, slip op. 17. A prior evidentiary hearing is not necessarily required by due process where the issues "lend themselves to documentary proof" (*id.* at 9), as tends to be the case with disability terminations. The challenged procedures do not wholly deny a recipient of disability benefits notice and a hearing prior to termination. Compare *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73–157, decided May 15, 1974, slip op. 15–16. Rather, the question is whether due process is provided by procedures calling for substantial pre-termination notice and a hearing on the record, lacking only a right to oral presentation and cross-examination of witnesses.

In *Goldberg* v. *Kelly*, *supra*, the Court recognized that "[s]ummary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible * * * [and] conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held." 397 U.S. at 265. The Court held, however, "that these governmental interests are not overriding in the welfare context." *Id.* at 266.[13] But, in the context of disability terminations

[13] In *Goldberg* v. *Kelly*, the Court's conclusion that pre-termination written submissions were constitutionally inade-

(Continued)

the Court has already held that the right of cross-examination recognized in *Goldberg* v. *Kelly* need not be fully applied, in part because of the "'sheer magnitude of [the] * * * administrative burden'" on the Secretary's staff, responsible for a nationwide program, and the concomitant cost and substantial drain on the trust fund. *Richardson* v. *Perales*, *supra*, 402 U.S. at 406. We believe that similar considerations also outweigh the need to protect further the disability benefit recipient's interest in avoiding a wrongful termination by having an oral evidentiary hearing prior to termination.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1974.

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quate rested in part upon the assumption that most welfare recipients "lack the educational attainment necessary to write effectively and * * * cannot obtain professional assistance." 397 U.S. at 269. That characterization cannot automatically be applied to recipients of disability benefits.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 73–1864

GEORGE H. ELDRIDGE, APPELLEE

v.

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James C. Turk, District Judge

(Argued February 7, 1974; Decided: April 1, 1974)

Before BRYAN, Senior Circuit Judge, and BUTZNER, Circuit Judge

James C. Hair, Jr., Attorney, United States Department of Justice, (Irvin Jaffe, Acting Assistant Attorney General, Leigh B. Hanes, Jr., United States Attorney, and Kathryn H. Baldwin, Attorney, United States Department of Justice, on brief) for Appellant; Donald E. Earls and Carl E. McAfee (Cline, McAfee, Adkins and Gillenwater on brief) for Appellee.

Per curiam

Asserting that his action in terminating appellee George H. Eldridge's medical disability payments, in July 1972, without a prior *oral* evidentiary hearing,

was proper under the Social Security Administration's regulations, the Secretary of Health, Education, and Welfare now appeals the District Court's injunction of the termination.[1]

The point in this case is whether the procedure prescribed in the regulations[2]—textually followed by the Secretary—afforded the recipient Constitutional due process in allowing his disability payments to be terminated without such an ore tenus hearing as is projected in Goldberg v. Kelly, 397 UN 254, 264, 267 (1970). On the District Judge's opinion, we affirm. Eldridge v. Weinberger, 361 FS 520 (WDVa. 1973).

Affirmed.

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[1] 42 USC 405(a); 20 CFR 404.1 et seq.

[2] Disability Insurance State Manual, as revised February 25, 1972; and Claims Manual of the Social Security Administration.

APPENDIX B

[Clerk's Office U.S. Dist. Court, at Abingdon, Va., filed Apr. 9, 1973, Joyce F. Wilt, Clerk, By: Linda S. Wood, Deputy Clerk]

In the United States District Court for the Western District of Virginia, Abingdon, Virginia

Civil Action No. 72-C-167-A

GEORGE H. ELDRIDGE, PLAINTIFF

v.

CASPER WEINBERGER, DEFENDANT

Opinion and Order

By: JAMES C. TURK, *U.S. District Judge.*

This action challenges the constitutionality of the procedures employed by the Secretary of Health, Education and Welfare to terminate disability benefits. The merits of plaintiff's claim that he is disabled are not before this court since he has not exhausted his administrative remedies, but has instead chosen to challenge the procedures for terminating disability payments as being repugnant to the due process requirements of the Fourteenth Amendment of the United States Constitution. Specifically, plaintiff contends that he should have been afforded an evidentiary hearing prior to the termination of his disability benefits.

The material facts in this case have been set out in an affidavit from the Director of the Bureau of Disability Insurance of the Social Security Administra-

tion. On June 2, 1968 following the presentation of evidence before a hearing examiner, George Eldridge, plaintiff in this case, was awarded disability benefits under sections 216(i) and 223 of the Social Security Act. He was advised that the award would be reviewed in June, 1969 to determine if he was still disabled. On February 18, 1970, a determination was issued that his disability had ceased as of January, 1970 and benefits were terminated. Plaintiff requested a reconsideration on April 11 and April 23, 1970, and on August 27, 1970 filed suit in this court seeking an administrative hearing prior to the termination of benefits. This court, on June 26, 1970, ordered that payments be continued during the pendency of plaintiff's claim. Following a reconsideration determination adverse to plaintiff, a hearing was held on March 17, 1971, and a hearing examiner concluded that plaintiff's disability had not ceased prior to that date. This decision was effectuated on April 30, 1971, and this court dismissed the aforementioned suit on grounds of mootness.

Plaintiff's case was again scheduled for review the following year for possible medical improvement. On March 20, 1972 the Virginia State Agency sent a questionnaire to plaintiff concerning his continued eligibility for disability payments. He indicated that his condition had not improved and listed medical sources where he had recently received treatment. The State Agency received a medical report from plaintiff's physician on April 24, 1972 and a psychiatric consultant submitted a report on May 12, 1972. Then on May 16, 1972, the State Agency advised plaintiff that the medical evidence in his case indicated that he was able to work as of May, 1972. This notice explained the reasons for the conclusion that he was no longer disabled, advised him that a reasonable time would be

granted for him to obtain and submit additional information, and enclosed an envelope in order that additional information relevant to his claimed disability could be forwarded. Plaintiff was advised that under the Social Security Law benefits would be paid for the month in which it had been determined that he regained the ability to work plus two additional months.

On May 25, 1972 plaintiff responded to the letter from the State Agency by advising that he felt that there was already adequate evidence to prove his disability and that it should proceed to decision on the evidence. On June 12, 1972 the Bureau of Disability Insurance of the Social Security Administration approved the State Agency's findings that plaintiff's disability had ceased as of May, 1972 and that benefits would terminate after July, 1972. Plaintiff was notified of this initial determination on July 7, 1972 and advised of his right to request review by the Social Security Administration within six months of that date. Plaintiff began the present action in this court on August 3, 1972.

The procedures followed by the State Agency were set out in the Disability Insurance State Manual, the operating manual for State Agencies.[1] These policies and procedures became effective in accordance with revisions issued February 25, 1972. These procedures require notice by phone or mail to the recipient of disability benefits concerning the review of his disability. In cases in which the medical evidence conflicts with the beneficiary's assessment about the severity of his impairment, the beneficiary is given a brief

[1] The initial determination of cessation of disability is rendered by the State Agency (Vocational Rehabilitation) under an agreement with the Social Security Administration (through delegations from the Secretary) in accordance with section 221 of the Social Security Act, 42 U.S.C. § 421.

summary of the evidence justifying a proposed adverse action and at least ten days in which to respond. Additional time may also be granted in order that the beneficiary can gather and submit additional evidence. The Claims Manual of the Social Security Administration contains provisions which complement the above procedures of the Disability Insurance State Manual. There is no dispute that these procedures were fully complied with in the present case, and the only issue before this court is whether such procedures satisfy the minimum requirements of due process of law.

Plaintiff's contention that an evidentiary hearing is a constitutional prerequisite to the termination of disability benefits finds support in the companion cases of *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) and *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970) in which the Supreme Court held that benefits received under Title IV (Aid to Families with Dependent Children) and Title I (Old Age Assistance) of the Social Security Act cannot be suspended or terminated without first giving the recipient adequate notice and an effective opportunity to defend by confronting adverse witnesses and presenting his own evidence and arguments orally. The defendant has sought to distinguish these cases arising under Titles I and IV of the Social Security Act from those involving disability benefits under Title II of the Social Security Act.

Following the decisions in *Goldberg* and *Wheeler,* the question of whether the due process requirements in those cases were applicable to disability beneficiaries was considered by at least two courts. In *Messer* v. *Finch,* 314 F. Supp. 511 (E.D. Ky. 1970) and *Wright* v. *Finch,* 321 F. Supp. 383 (D.D.C. 1971) three judge courts considered challenges to the constitutionality of section 225 of the Social Security

Act, 42 U.S.C. § 425, which authorizes the Secretary to "suspend" payment of disability benefits if he believes on the basis of evidence submitted to him that disability may have ceased.[2] The court in *Wright* held that a recipient of disability benefits must be given adequate notice and an opportunity to participate in termination proceedings prior to suspension. The court in *Messer* reached the opposite result. The Supreme Court noted probable jurisdiction in *Wright,* but because the Secretary had promulgated new regulations to be followed by the Social Security Administration in determining whether to suspend or terminate benefits the court felt it appropriate to withhold a decision on the merits until the cases had been considered by lower courts under the new regulations. Accordingly, the decision of the three judge court in *Wright* was vacated and the case was remanded to the Secretary. *Richardson* v. *Wright,* 405 U.S. 208 (1972).

The new regulations referred to by the Supreme Court in *Wright* are those discussed, *supra,* that were applied to the termination of plaintiff's disability benefits in this case, and the question of whether these termination procedures meet the constitutional requirements of due process is squarely before this court.

In deciding whether the requirements of due process have been satisfied in this case, it is important to first recognize that due process safeguards vary with

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[2] These cases involved the "suspension" of benefits under the statute, 42 U.S.C. § 425, whereas in the case before this court an initial decision was made to terminate plaintiff's benefits. Hence plaintiff is not challenging the constitutionality of the statute but the procedures set forth in the regulations for determining that his disability has terminated. 20 C.F.R. § 404.905(d).

the rights sought to be protected. In *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961) the Supreme Court stated:

> (t)he very nature of due process negates any concept of inflexibile procedures universally applicable to every imaginable situation * * * what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.

The court in *Goldberg* presented the issue in a similar manner as follows:

> The extent to which procedural due process must be afforded to the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. 254 at 262–263 (1970).

In balancing the government interest against the private interest in this case, the defendant has sought to distinguish the welfare recipient in *Goldberg* from the disability recipient in the present case on a number of grounds. It is argued that in the case of welfare recipients "need" was the legal criterion for benefits and "termination of aid pending resolution of a controversy may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S. at 263. By contrast, according to the Secretary, the legal criterion for Title II disability benefits is whether the beneficiary continues to be "unable to engage in substantial gainful activity," 42 U.S.C. 423

(d)(1), which obtains irrespective of need. This distinction is not persuasive for purposes of due process. Although disability beneficiaries are not by definition dependent on benefit payments for their livelihood, they are by definition unable to engage in substantial gainful activity, and to cut off payments erroneously may create a loss as "grievous" as that which concerned the Supreme Court in the cases of welfare and old age beneficiaries.

In any case, in the recent case of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) the Supreme Court specifically rejected a narrow reading of *Goldberg* that would limit the due process requirement of a prior hearing to cases involving necessities. *Fuentes* involved a challenge to Florida and Pennsylvania statutes which provided for the issuance of writs ordering state agents to seize a person's possessions simply upon an *ex parte* application of any other person who claimed a right to the goods and posted a security bond. In the earlier case of *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969) the court had held that a Wisconsin statutory scheme which permitted the freezing of ½ of the wages due an employee without notice or a prior hearing violated procedural due process. In *Fuentes* it was argued that *Sniadach* and *Goldberg* should be narrowly read as limited to cases involving absolute necessities. In rejecting a narrow reading of those cases the court stated:

> Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. * * * While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that

> emphasis into a new and more limited constitutional doctrine.
>
> Nor did they carve out a rule of "necessity" for the sort nonfinal deprivations of property that they involved. 407 U.S. at 88, 89.

The court in *Fuentes* also made reference to the case of *Bell* v. *Burson,* 402 U.S. 535 (1971) in which the court had held that there must be an opportunity for a hearing on the issue of fault before the license of an uninsured motorist could be suspended. The court in *Fuentes* noted that the drivers license involved in *Bell* did not rise to the level of a "necessity" as in the cases of wages or welfare benefits but was nevertheless an important interest entitled to the protection of procedural due process. From the above case it is thus apparent that *Goldberg* is not distinguishable from the case at bar in terms of the criterion for benefits.

Defendant next argues that the nature of the evidence involved in the case of a disability recipient ("medical reports of highly probative value") justifies a different due process standard than in the case of welfare recipients where "rumor and gossip" are more likely to form the basis of an adverse decision. This argument has been somewhat refuted by the history of this case. Plaintiff was denied disability benefits on the basis of his written application and medical reports on two different occasions, but in both cases prevailed after being afforded an evidentiary hearing before a hearing examiner. It is true that the court in *Goldberg* stated that "(p)articularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." 397 U.S. at 269. But the court also characterized the pretermination hearing as important "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on the

misapplication of rules or policies to the facts of particular cases." 397 U.S. at 268. There is no doubt that medical evidence may be conflicting, *Richardson* v. *Perales,* 402 U.S. 389 (1971), and the Secretary must exercise judgment in resolving the conflicting medical evidence. 20 C.F.R. § 404.1526. Thus there will be a resolution of factual issues in disability cases, and the exercise of subjective judgment to resolve conflicting evidence of a factual nature makes the value of a hearing self evident. But in addition, it is noteworthy that determinations of total disability are not exclusively a function of medical evidence. The four elements of proof required for the establishment of a disability claim were set forth in *Underwood* v. *Ribicoff,* 298 F. 2d 850, 851 (4th Cir. 1962) as follows:

> (1) the objective medical facts;
>
> (2) the diagnoses of treating and examining physicians on subsidiary questions of fact;
>
> (3) the subjective evidence of pain and disability testified to by claimant and corroborated by his wife and neighbors; and
>
> (4) claimant's educational background, work history and present age.

There is no requirement that a disability under the Social Security Act be proven by "objective" medical evidence. *Flake* v. *Gardner,* 399 F. 2d 532, 540 (9th Cir. 1968); *Whitt* v. *Gardner,* 389 F. 2d 906, 909 (6th Cir. 1968). The testimony of the claimant or witnesses in his behalf may be crucial in establishing a disability.[3] See, *Page* v. *Celebrezze,* 311 F. 2d 757 (5th Cir. 1963).

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[3] For a discussion of the value of oral testimony and vigorous advocacy in disability cases and the somewhat vulnerable status of medical reports in such cases see, Haveland & Glomb, *The Disability Insurance Benefits Program and Low Income Claimants in Appalachia*, 73 W. Va. L. Rev. 109, 117–137 (1971).

Also of relevance to the Secretary's argument that disability cases are distinguishable from welfare cases because of the nature of the evidence involved in the case of *Fuentes* v. *Shevin, supra.* In response to the contention that defendants could repossess goods without first affording plaintiffs a hearing in the case of a default in payments on a conditional sales contract the court stated:

> The right to be heard does not depend on an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake. * * * 407 U.S. at 87.

The court also stated:

> The issues decisive of the ultimate right of continued possession, of course, may be quite simple. The simplicity of the issue might be relevant to the formality or scheduling of a prior hearing. See, *Lindsey* v. *Normet,* 405 U.S. at 65. *But it certainly cannot undercut the right to a prior hearing of some kind.* 407 U.S. at 87 Fn. 18. (Emphasis added).

The Secretary's final argument in support of his position that a pre-termination hearing should not be required for disability recipients is that to require such hearings would result in vast disruption of the Social Security System. The Secretary has submitted evidence to show that to require pretermination hearings would cause administrative inefficiency and result in substantial cost. The same arguments were made in

Goldberg, but the court there held that the State's concern in preventing an increase in its fiscal and administrative burden was outweighed by the interests of welfare recipients in receiving payments and the State's interest that the payments not be erroneously terminated. The court recognized that some greater expense would be involved but felt that this could be reduced "by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." 297 U.S. at 266.

The Secretary asserts that under the present procedures the determination to cease paying disability benefits is made initially by the State Agency after the Social Security Administration has conducted its investigation, and then by the Administration's Bureau of Disability Insurance on review, and this system could not accommodate a requirement of a pre-termination hearing. According to the Secretary, a pre-termination hearing would require that the beneficiary be allowed to participate in either the State Agency determination proceedings or the decision of the Bureau of Disability Insurance which is located in Baltimore. The Secretary asserts that this would require either that the beneficiary travel great distances or that federal officials travel to the area in which the beneficiary resides. Furthermore, to turn the decision-making function over to the Social Security Administration's local offices would require staffing these offices with individuals qualified to make vocational and medical judgments, would entail the duplication of personnel already staffing State Agencies and would make uniformity and consistency in the administration of the program all but impossible. Hence, the Secretary concludes that the burden of a prior hearing is so great as not to be justified. This argument has been effectively met by Justice Brennan in his dissent

from the refusal of the court to reach the merits of the case in *Richardson* v. *Wright,* 405 U.S. 208, 223 (1970). He there points out that there are currently post-termination hearing procedures provided, 20 C.F.R. §§ 404.917–941, and the Secretary could comply with the requirement for pre-termination hearings by merely changing the timing of the hearings. This was done in the case of welfare recipient after *Goldberg,* and there has been no showing that it could not be done here.

The Secretary initially asserted that a requirement of pretermination hearings would result in losses of $16 million to the Social Security Trust Fund, but in a supplemental brief and affidavit this figure was increased to $45 million. The Secretary arrives at this figure by noting that in 1972 there were 39,078 cases in which an initial determination of cessation of disability were rendered and that the average monthly benefit in those cases was $325. The average cost of a hearing is estimated to be $400, and this cost is estimated to increase by 30% if hearings were held in every case due to the need for increased staff and available facilities. From these figures the Secretary argues that to provide prior hearings which would result in a delay in termination of benefits of 2 months would cost $45 million.

As was pointed out by Justice Brennan in *Richardson* v. *Wright, supra* at 223–226 this figure is grossly inflated. He there noted that the Secretary has assumed that all beneficiaries will demand a prior hearing. The Secretary's own figures show that of the 39,078 cases in which determinations of cessation of disability were rendered in 1972 only 2,801 post-termination hearings were held. It is certainly possible that even a smaller percentage of disability beneficiaries would demand pre-termination hearings due

to the fact that the new regulations provide for notice and an opportunity to respond in writing before termination.

Justice Brennan also noted that the Secretary assumes that all of those demanding hearings will lose, and that the Secretary will be unable to recover any of the benefits paid to beneficiaries pending the hearing. Both of these assumptions are unwarranted. Not only do a substantial number of persons demanding a hearing prevail, but the Secretary is directed to require a refund from the beneficiary or decrease future benefits in the case of an overpayment. 20 C.F.R. §§ 404.501–404.502. The Secretary also assumes that a pre-termination hearing would entail a two-month delay in the termination of disability benefits. But under current procedures benefits are paid for two months after a disability ceases, and it is hard to believe that it would take an additional two months (four months after an initial determination that disability had ceased) to have a hearing.

Finally, it can be noted that the Secretary has not taken into account the cost of present procedures which should be offset against the cost of new procedures. In short, the assumptions and omissions in the Secretary's analysis of the cost of requiring pre-termination hearings in disability cases make the $45 million figure almost meaningless. It is perhaps true that some additional cost will be entailed by the government in providing pre-termination hearing to those disability recipients who request it, but it does not appear that the government's interest in minimizing costs and maximizing administrative efficiency are of such overwhelming significance in this case as to outweigh the needs of the individual not to be erroneously found to be able to engage in substantial gainful activity.

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What the Supreme Court said in a related area is worth repeating here in light of the Secretary's argument.

> A prior hearing always imposes some cost in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell* v. *Burson, supra,* at 540–541; *Goldberg* v. *Kelly, supra,* at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests, it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley* v. *Illinois,* 405 U.S. 645, 656. *Fuentes* v. *Shevin, supra,* at 90 Fn. 22.

In *Bell* v. *Burson, supra,* at 540–541, the court rejected the argument that the additional cost of an expanded hearing was sufficient to forego a hearing as to fault prior to the revocation of a drivers license. The court there stated:

> It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective. 402 U.S. at 542.

In *Fuentes supra* at 90–91, the court stated:

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. *Boddie* v. *Connecticut,* 401 U.S. at 379. These situations, however, must be truly unusual. Only in a few limited situations has this court allowed outright seizure without an opportunity for a prior hearing.

It is the opinion of this court that the defendant has not demonstrated that the termination of disability payments is such an "extraordinary situation" that the basic notions of fairness encompassed in the due process clause should be excepted in this case. As has been previously noted the Supreme Court has required a prior hearing in cases of drivers license revocation, the repossession of goods under a conditional sales contract, the garnishment of wages, and the termination of benefits under Title I and IV of the Social Security Act. In addition, the requirements of a prior hearing have been held applicable to cases of public housing tenancy being terminated. *Escalera* v. *New York Housing Authority,* 425 F. 2d 853 (2d Cir.), *cert. denied,* 400 U.S. 853 (1970); *Caulder* v. *Durham Housing Authority,* 433 F. 2d 998 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1971).

In light of prior hearing being required in cases of interests which are seemingly less substantial than receiving disability benefits this court can find no basis for considering disability payments such an unusual situation as to require a less due process standard.

For the aforementioned reasons and authority it is the conclusion of this court that the plaintiff in this case, as the recipient of benefits under Title II of the

Social Security Act, must be afforded a hearing in the nature of that required for welfare beneficiaries under Title IV of the Social Security Act prior to the termination of his benefits.

The Secretary's motion to dismiss is denied and the case is remanded to the Secretary for the payment of disability benefits and for further proceedings not inconsistent with this opinion.

Enter: This 6th day of April, 1973.

JAMES C. TURK,
U.S. District Judge.

A true copy.
Teste:

JOYCE F. WITT, *Clerk.*
By: LINDA S. WOOD, *Deputy Clerk.*

APPENDIX C

PREFACE (Continued)

ABBREVIATIONS COMMONLY USED IN SSA CASE FILES

The following abbreviations are explained here because they appear frequently in SSA disability case files.

AC—Appeals Council
AN—Social Security Account Number
APTD—Aid to the Permanently and Totally Disabled
AQD—Alleged Quarter Disability Began
AYD—Alleged Year Disability Began
BDI—Bureau of Disability Insurance
BDPA—Bureau of Data Processing and Accounts
BHA—Bureau of Hearings and Appeals
BRSI—Bureau of Retirement and Survivors Insurance
CDB—Childhood Disability enefits
CM—Claims Manual (SSA operating instructions for field staff)
DBS—Division of Benefit Services, BDI
DHEW—Department of Health, Education, and Welfare
DIB—Disability Insurance Benefits
DIL—Disability Insurance Letter
DISM—Disability Insurance State Manual
DO—District Office, SSA
EQD—Established Quarter Disability Began
E/R—Earnings Record

HE—Hearings Examiner
OAIB—Old-Age Insurance Benefit on Beneficiary
OASDHI—Old-Age, Survivors, Disability and Health Insurance (Program)
PC—Payment Center (SSA benefits payment center)
PIA—Primary Insurance Amount
QC—Quarter of Coverage
RC—Report of Contact (Form OAC–5002)
RO—Regional Office (Social Security Administration, DHEW)
RRB—Railroad Retirement Board
RRDI—Regional Representative, Disability Insurance
SA—State Agency (under agreement to make disability determinations pursuant to § 221 of the SSA)
SE—Self Employment
SEI—Self-Employment Income
SGA—Substantial Gainful Activity
SSA—Social Security Administration or Social Security Act
SSR—Social Security Ruling
VA—Veterans Administration
VR—Vocational Rehabilitation
VRA—Vocation Rehabilitation Administration
WE—Wage Earner

350.—The Administration's Objective—In General

Most people who get a social security check depend on it for the necessities of life. Therefore, one of the principal goals of the Administration is to see that disability beneficiaries get their checks every month at the time they expect them, and that the *right check continues to be sent to the right person, at the right*

address, on time as long as he continues to be eligible for such benefits.

Assurance that the eligibility requirements of the law continue to be met is implicit in the goals of correct and timely payments. When payment is not due, it must be stopped as promptly as practicable, but care must be exercised to stop payment only when (and in the manner) authorized by applicable law, regulations and administrative instructions and the general requirements of "due process". Hence, it is incumbent on all components of the Administration to see that the beneficiary (or his representative payee) receives meaningful predetermination notice of any possible adverse action, the basis for the proposed action, and an opportunity to rebut the facts on which the proposed action is predicated. Of course, after a formal determination is effectuated, he must (1) be given written notice of the determination (including rationale) and (2) be informed of his rights to relief and appeal under the law. Under SA agreements, BDI notifies the beneficiary of the formal determination made on the issue of initial and continuing entitlement. However, the role of the district office, SA's and BDI is to assure that the beneficiary is afforded "due process" prior to check-stoppage (i.e., suspension of benefit payment. see § 265.1ff). Also see § 353.6 for SA's role in situations involving proposed medical recovery cessation cases.

Maintaining the desired standard of excellence presents a continuing challenge. The number of actions which must be taken each year in the Bureau of Disability Insurance to start, stop, or change the benefit amount or address on checks runs into several hundred thousand. Notwithstanding the large number of disability beneficiaries who are served, we cannot afford to lose sight of the fact that (1) each one

merits our concern and expert help and (2) his social security payment is most likely a very important consideration in the pattern of his life. He has a right to expect courteous, prompt, and correct handling of his case irrespective of whether we are paying, suspending, terminating or reinstating benefits.

351.—Factors Affecting Continuance of Eligibility and Receipt of Benefits

A. *Disability Insurance and Childhood Disability Beneficiaries.*—There are two primary reasons for finding cessation of disability in DIB and CDB cases: (1) the impairment has improved since the previous initial or continuing determination to the point where it is no longer of such severity as to prevent the beneficiary from engaging any substantial gainful activity; or (2) the beneficiary has demonstrated by work activity (with due consideration to the trial work period provisions when applicable) that despite his impairment, he has regained his ability to engage in substantial gainful activity.

B. *Disabled Widow (or Widower) Benefits.*—For a beneficiary entitled to DWB, cessation of disability will be found when such person's impairment improves to the point where it no longer meets or equals the level of severity described in the Listing of Impairments or when the individual engages in SGA. The trial work period provisions do not apply to disabled widows or widowers.

C. *How CD Issues Arise.*—Cases which generally require continuing disability determinations arise from (1) voluntary reports from beneficiaries of medical improvement or return to work, (2) earnings posted to the individual's social security record, (3) medical re-examination diaries established for the conditions described in § 348.1B (or re-established per

§ 349.1), (4) reports of release from a mental or TB hospital, (5) reports of successful rehabilitation, and (6) random spot checks. The following sections provide instructions for handling cases where a continuing disability issue has arisen on the basis of one or more of these considerations, requiring a determination as to whether disability continues.

352.—Work Activity—Development of Evidence

A. *BDI Development Procedures.*—1. *Direct Mail Contact with Beneficiary.*—Continuing disability cases involving work activity are identified by BDI and developed directly with the beneficiary (or payee) by means of a letter—questionnaire. (See "2" below for exclusions that are to be developed by personal interview in the district office.) BDI mails Form SSA–821(a)—"Report of Work Activity—Continuing Disability" (See Exhibit #3a) to the beneficiary for completion and includes a postage-free envelope preaddressed to BDI for returning the form. This form alerts the beneficiary to the fact that the information submitted will be used to verify his continuing entitlement and, if it is determined that he is no longer entitled, benefits will cease.

The questions solicit data regarding (1) wage postings, (2) work activity, (3) current medical restrictions, and (4) VR services, if any; also the beneficiary is invited to submit additional information that he believes is important, and will assist in the review of his continuing entitlement. Where benefits should be suspended, such action will not be taken until the beneficiary has been notified of the proposed suspension and the information and evidence upon which it is based and given an opportunity to submit rebuttal information and evidence (see B2 below).

This development technique is utilized by BDI to secure documentation in all instances where a TWP diary date matures, unexplained postings are reported to a beneficiary's earnings record, the beneficiary voluntarily reports a return to work and is not entitled to a TWP (or previously completed it), a notice is received that the beneficiary has successfully completed a VR training program, and in all other situations not listed as an exclusion in "2" below.

2. *Exclusions from BDI Direct-Mail Procedure.*—Because of special development requirements, the following categories of cases will be developed by the DO through a personal interview with the beneficiary and then sent directly to the SA if an issue is present (see "B" below). When these cases are received in the SA all conflicts should have been resolved; if not, the SA may develop as necessary or the file may be returned to the DO, as appropriate.

(a) Self-employment work activity cases
(b) Agricultural employment cases
(c) Voluntary report of work activity with a future (or outstanding) medical reexamination date

3. *BDI Review.*—BDI receives and reviews the beneficiary's responses to the direct mail contact with the beneficiary to determine whether an issue of continuing disability is actually present. Cases in which (1) the beneficiary is entitled to *additional* months of a trial work period, or (2) posted or reported earnings are determined *not* to represent work, or (3) actual earnings are clearly below the SGA level, etc., are disposed of as "No Issue" cases, and as such, are not sent to the SA. Cases where an issue *is* present are sent by BDI directly to the SA for adjudication. Where the beneficiary does not respond or where his response is inadequate or creates a complex issue or

a material conflict exists, (see 4 below), BDI requests assistance from District Offices.

4. *Evidence Conflicts with Beneficiary's Allegation.*—Where the evidence indicates the beneficiary is engaging in substantial gainful activity and such evidence conflicts *in any way* with the beneficiary's assessment about (1) his work activity, (2) the proposed date of cessation, or (3) his entitlement to a TWP, the beneficiary will be contacted by the DO to clarify any factual differences or misunderstanding before the folder is forwarded to the SA for a determination of cessation.

A conflict arises when the beneficiary's answers, e.g., on the SSA–821(a), the SSA–821, or subsequent development, are in conflict with the tentative conclusion reached by BDI or the DO that a cessation is justified based on other evidence of record. Some examples of such a conflict are: (1) beneficiary makes a statement that he is *not* engaging in SGA in spite of actual earnings clearly above SGA level, or (2) there is *any* material conflict between the evidence and the beneficiary's allegation as to amount of earnings, value of subsidy, length of work effort, date when work became SGA, entitlement to TWP, etc. (see § 330ff).

B. *District Office Responsibilities—Work Activity*—1. *General*—When the direct mail procedure is ineffective, BDI requests DO assistance. Also, the beneficiary may personally contact the DO since Form SSA–821 (a) contains the statement . . . "If you have any questions or need help in filling out this form, please telephone or visit any social security office." In addition, a beneficiary may inform a DO of a work event which requires a continuing disability investigation. In these instances the DO will (1) provide whatever assistance is needed, (2) develop pertinent facts di-

rectly with the beneficiary or payee, and (3) secure necessary documentation. Whenever a conflict arises (see "A4" above), the DO will resolve the conflict by a personal interview with the beneficiary whenever possible, and where necessary, obtain needed documentation, such as, a breakdown of wages from an employer. Whenever the evidence supports a suspension or cessation of benefits, the beneficiary will be (1) informed of the proposed action, (2) advised of the evidence on which such action is based, and (3) given an opportunity to submit rebuttal evidence. When the DO concludes that the beneficiary's employment demonstrates an ability to engage in SGA, the file will be documented accordingly and forwarded to the SA (see 2 below for processing before DO suspension action is taken). However, if it is clear that an issue of continuing disability is not present (and in all cases where the folder is in BDI), the DO forwards all material to BDI.

2. *DO Review Before Suspension Action is Processed.*—When the DO concludes that the beneficiary's employment demonstrates an ability to engage in SGA *and* either (1) benefits have already been overpaid or (2) an overpayment is imminent, the DO will immediately contact (or recontact) the beneficiary. The purpose of this contact is to (1) inform him of the reasons for the DO requesting that his benefits be suspended and to give him an opportunity to submit rebuttal evidence. The offer of the opportunity to submit rebuttal evidence should be documented in the file. The DO will consider any additional statement or evidence submitted in deciding wheher the request to suspend benefits is warranted. When this has been done, and a termination action is still supported, the DO will send the folder to the SA and request BDI to suspend benefits. (If the folder is not in the DO,

the DO will forward the evidence with a request for suspension to BDI for association with the folder. BDI will then send the folder to the SA for adjudication.)

C. *State Agency Responsibility.*—The completed Form SSA–821(a) and other information submitted by the beneficiary is associated with the case folder and sent by BDI (and in some instances by the DO) to the SA. The evidence submitted should ordinarily be sufficient to permit a determination as to continuing entitlement.

Where the SA finds the total CD evidence is not adequate for adjudicative purposes (see § 352.1ff), the SA may develop as necessary or may refer the case to the DO for any assistance, as appropriate. Requests for district office assistance should be precise and specify what information is needed by the SA for adjudication. Where the SA contact with the beneficiary is by telephone, the information received should be recorded on an SSA–5002 (Report of Contact) and annotated to show that the information resulted from a telephone contact. The name of the person providing the information should always be recorded on the form and confirmation secured when appropriate (see § 353.4C).

Before a final determination is made, the SA should assure itself (1) that it is in possession of all pertinent evidence of record, (2) that the evidence in file is of sufficient probative value to permit a sound determination, (3) that in work cessations (see 353ff for cessation based on medical recovery) the beneficiary has had the opportunityto present whatever evidence he felt was pertinent to the DO, to BDI, or to the SA, and (4) that in cases where there was a conflict between the evidence supporting the cessation and the beneficiary's statements, that the folder is adequately

documented with regard to the DO's effort to rectify the conflict of facts or understanding. When the determination is made, it should be forwarded with the folder to BDI.

352.1 Work Activity—Trial Work Period

The law provides a trial work period without loss of benefits for persons determined to be under a disability and thus entitled to DIB or CDB. The individual who is still severely impaired may render "services" in as many as 9 calendar months (not necessarily consecutive) during which his work, regardless of the magnitude, will not be the sole consideration in determining whether disability has ceased. Not until after 9 months of services will his work be considered in determining whether he has demonstrated an ability to engage in SGA, if in the meantime his condition has not improved. After the end of the trial work period, any work (including the services rendered during any of the 9 months) may be considered in determining whether he is able to engage in SGA in any month thereafter.

A. *Investigation Before End of the Trial Work Period.*—If the medical evidence upon which the initial allowance or continuance is based indicates some likelihood of recovery from the impairment (i.e., a medical reexamination diary has been established), a return to work before the month the diary falls due will be considered as a possible indication of medical recovery (§ 353.2A). Under these circumstances BDI will send the case to the DO for an interview with the beneficiary. Subsequently, the case will be forwarded to the SA for a determination of continuance or cessation.

If it cannot reasonably be determined from the medical evidence in file and the DO interview whether the beneficiary is still disabled, the SA will develop

the medical aspects. If the evidence reveals the individual has recovered from his impairment, cessation will be found with the month established by current medical evidence (see § 353.2). Retroactive cessation to the month work began should not be found unless the facts (medical and work) clearly demonstrate the propriety of such action.

If the medical evidence obtained reveals the individual is still disabled, a continuance will be prepared and his case will not be investigated again until he has worked in 9 months, or when a subsequent medical reexamination diary matures, or affirmative evidence of medical recovery is received, whichever date is earliest.

Affirmative evidence of medical recovery may include a report from a physician, hospital, clinic, etc., indicating recovery or a clear statement from a competent individual that he has recovered or improved which there is no reason to question or doubt.

B. *Investigation After End of Trial Work Period.*—Most disability beneficiaries have impairments which, by their nature, are either static or progressive. Since medical recovery is not expected, a return to work under these circumstances is not considered as an indication of the possibility of medical recovery. An investigation in this type of case will not be started until the individual has worked in at least 9 months or affirmative evidence of medical recovery is received before 9 months of services have been rendered.

352.2 Trial Work Period—Definition of Services

A. *General.*—The term "services" means activity in employment or self-employment which is performed for remuneration or gain or is determined to be of a type normally performed for remuneration or gain.

Since the trial work provision is intended to give a disabled beneficiary the opportunity to test his ability to work and hold a job, minor work activity may generally be disregarded. Therefore, work activity in *employment* in a month will constitute "services" only if it is actually or usually performed for remuneration or gain amounting to more than $50, either in cash or in kind. Work activity in *self-employment* will be determined to be "services" only where net earnings in a calendar month are more than $50 for a month or the self-employed person spends more than 15 hours in that month in the work activity.

In some SE cases it may not be possible to isolate from the total net earnings the net earnings for each particular month or self-employment. When this occurs after full development divide the net earnings for the particular work period by the months of self-employment to find net earnings per month. Cases where remuneration for employment is in the form of commissions should be handled in a similar manner.

B. *Activity Which Does Not Constitute "Services" for Purpose of Charging Trial Work Period Months.*—Activity performed by a beneficiary for which payment *in excess* of $50 a month is made does not constitute "services", if the activity, although, resembling services in employment for remuneration or gain, is:

(1) part of a prescribed program of medical therapy; and

(2) carried out in a hospital under the supervision of medical and administrative staff; and

(3) is not performed in an employer-employee relationship; and

(4) is not normally performed for remuneration or gain.

See SSR 69–46 for a case illustrating activity performed under these circumstances. When appropriate, the DO will develop the question of employer-employee relationship and prepare a special determination as to the existence of an employer-employee relationship.

352.3 When the Trial Work Period Does Not Apply

A. *Freeze Cases.*—A person entitled to a freeze only is not entitled to a trial work period. Examples of freeze only cases are:

1. Individual is entitled to a freeze only because of railroad or military service credits that may be used toward a freeze but not toward entitlement to DIB.

2. Individual is statutorily blind but is not entitled to a disability insurance benefit.

3. Where an individual in freeze status fails to file for DIB for some other reason.

B. *Only One Trial Work Period During a Period of Disability.*—An individual will not be entitled to more than one trial work period within the same disability period.

C. *Subsequent Period of Disability.*—If an individual's subsequent period of disability begins within 5 years after the termination of an earlier freeze or DIB, he may become entitled to DIB without serving a waiting period. In such cases, the trial work period provision does not apply.

Exception: There are cases, however, where a claimant becomes reentitled within 5 years after a prior cessation but he is not paid for the full number of months he is disabled. This can occur where the subsequent application is not filed until 18 or more months after the onset of the subsequent disability; since benefits can be paid retroactively for only 12 months, a beneficiary in this situation will have a period of 6 or more months after onset in which he does not receive

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benefits. Where a beneficiary does actually serve a waiting period, he is entitled to a trial work period.

Note: Even though a child in CDB status does not serve a waiting period and does not have a period of disability established, he is entitled to a trial work period if it is found he still has a severe impairment when he returns to work. If a CDB later becomes simultaneously entitled to DIB on his own account number, or his CDB is terminated and he later becomes entitled to DIB on his own account number, he must serve a 6-month waiting period before he can receive DIB. He is, therefore, entitled to a trial work period as a DIB (irrespective of whether he worked in a trial work period as a CDB). This remains true even if his period of disability and his entitlement to DIB occur within 5 years of his termination of CDB (no period of disability).

352.4 When the Trial Work Period Begins

The trial work period begins with the month in which the beneficiary has filed an application and becomes entitled to DIB or, in the case of a disabled child beneficiary who has attained the age of 18, with the month in which he attains age 18 or the month in which he becomes entitled to such benefits, whichever is later. The months of trial work (whether or not such months are consecutive) will be counted beginning with the first month within the trial work period in which a beneficiary, who is determined to still have a severe impairment, performs services.

Example 1: Beneficiary became entitled 11/66 by an application filed 11/66 and begins work 3/67. The trial work period begins 11/66 and counting of trial work months begins 3/67.

Example 2: Beneficiary became entitled 2/66 by an application filed 2/66; his onset date is 7/15/65 and he

begins work 12/65 (during the waiting period); work during the waiting period was determined to be not SGA. Trial work period and counting of months of trial work begin 2/66.

352.5 When the Trial Work Period Ends

The trial work period ends with the ninth month in which the beneficiary has worked in the trial work period or when his disability is determined to have ceased for reasons other than work (e.g., medical recovery), whichever is earlier. Therefore, the fact that most individuals are entitled to a trial work period beginning with the first month of entitlement does not mean that they are automatically entitled to 9 months of trial work.

Example 1: Beneficiary entitled 7/66 by an application filed 7/66 (no medical reexamination established); begins trial work in 1/67 and continues in all succeeding months. Trial work period ends with 9/67.

Example 2: Beneficiary entitled 7/66 by an application filed 7/66 (no medical reexamination established); begins trial work in 6/68. In 9/68 he submits a medical report from his attending physician indicating recovery (i.e., affirmative evidence). Based on further development, medical recovery, cessation is found 10/68. The trial work period ends with 10/68.

Example 3: Beneficiary entitled 7/66 by an application filed 7/66 (medical reexamination established for 6/67); begins trial work in 1/67. Evidence shows medical recovery in 1/67. Disability ceases and the trial work period ends with 1/67.

352.6 Evaluation of Work Activity After Trial Work Period

After an individual's trial work period has ended, the SA in determining whether his disability has ceased will review all medical and nonmedical factors,

including the claimant's work before, during, and after the trial work period. DISM 330ff contains guides for evaluating work activity.

When cessation of disability is found because the individual has demonstrated by working that he is able to engage in SGA, cessation may be established as of any month, after the end of the trial work period, in which the individual is determined able to engage in SGA. This may be the first month after the last month of work in the trial work period or any subsequent month, depending on the facts in the case. It is not necessary for the individual to still be working in the month of cessation. For example, if the SA receives a case in the ninth month of work which shows that the individual stopped working in the ninth month, cessation may be found the tenth month.

If the SA finds that the work is not SGA and the individual has an impairment which could reasonably be expected to improve, medical development should be undertaken to resolve the issue of medical recovery.

If the SA determines that a continuance is proper at the time of adjudication but that the work may become SGA at some point in the future, indicate in capital letters in Item 12 of the SSA–833, after the words "Evidence and Reasoning," "POSSIBLE FUTURE SGA CASE," so that BDI can establish proper controls on the case.

353.—Medical Recovery

353.1 General

A determination that disability has ceased will be made where the medical and vocational evidence establishes a capacity for substantial gainful activity, whether or not the beneficiary returns to work.

Issues of medical recovery generally arise in cases which have been scheduled for medical reexamination in accordance with § 347ff. When the reexamination date is reached, a continuing disability investigation will usually be initiated. The following sections govern the development and adjudication of continuing disability cases involving issues of medical recovery.

353.2 Possible Medical Recovery—Return to Work

A. *General.*—If a beneficiary's impairment might reasonably have been expected to improve (i.e., a medical reexamination diary was correctly established in accordance with §§ 348.1 or 349.1), a subsequent return to work before the month of the scheduled medical reexamination is considered as a possible indication of medical recovery and the case is sent to the DO for development. Upon completion of the DO development, the case is sent to the SA. The SA must carefully consider the development already undertaken to determine whether further medical documentation is needed and, if so, the type and extent necessary for a sound determination of continuance or cessation.

§ 353.2B—cross-refer to § 353.6

B. *Clear-Cut Cessation (Medical).*—In certain clear-cut cases, cessation may be found without current medical development on the basis of medical recovery as of the first month of return to full-time work with no significant medical restrictions. Where there is no evidence to the contrary, the evidence of record regarding the anticipated medical recovery may reasonably support a finding that the return to full-time work with no significant medical restrictions was occasioned by sufficient medical improvement (i.e., that the individual, by returning to full-time work has

clearly demonstrated that he has recovered to the extent that he has regained the ability to engage in SGA).

Example: The evidence obtained during the initial case processing revealed that the individual had an impairment with marked functional restrictions which was expected to continue for more than 12 months but that recovery was expected 18 months after onset and a medical reexamination was established accordingly. Upon notice by the beneficiary that he returned to work, a CDI was initiated. The district office CDI interview disclosed that 16 months after onset the beneficiary returned to full-time work earning $400 a month. He stated that his doctor said he could return to work and did not impose any medical restrictions. Cessation for medical improvement, without additional development, should be found in the 16th month after onset. (On Form SSA–833, Determination of "Cessation or Continuance of Disability", Item 11B, should be checked. In Item 12, Evidence and Reasoning, the finding of cessation should be based on medical recovery and not on the services rendered during the trial work period, which under the law may not be used as the sole basis for termination until the trial work period is completed.)

C. *Evidence of Record Inconclusive.*—In all cases where the evidence in the record is inconclusive (e.g., working part-time, allegations of continued disability or work contrary to medical advice), current medical development should be undertaken to resolve the issue of medical recovery (see § 353.4). For example, had the individual described in the example above returned to part-time work, current medical development would have to be undertaken because it is not clear he has fully recovered.

D. *Continuance.*—If it is found that the individual is working despite a continued severe impairment and such work is within the trial work period, a finding of continuance should be made. In no instance should the work by itself be considered a basis for cessation until the expiration of the trial work period (see § 352.4 above). Upon expiration of the trial work period, the work should be evaluated in accordance with § 330ff.

When preparing a continuance determination in a case where the individual has been working less than 9 months, if further and substantial improvement is anticipated (§ 347ff), the SA should indicate the appropriate date for a subsequent medical reexamination diary. However, ordinarily the diary should not be scheduled earlier than the anticipated 9th month of work, at which time, an investigation of both the medical improvement issue and work activity may be conducted simultaneously. If cessation is justified on the basis of substantial gainful activity, medical development would be unnecessary. However, if at the expiration of the anticipated 9th month of work it is found that the individual did not, in fact, work in all 9 months or his work does not constitute SGA, his case will still be investigated from a medical improvement standpoint.

E. *Cessation.*—Where the SA obtains current medical evidence which indicates a cessation is in order, the SA should find cessation in the month established by the medical evidence, irrespective of whether this coincides with the month of return to work. Retroactive cessation to the month work began should not be found unless the facts (medical and work) convincingly demonstrate the propriety of such action (see § 353.5). For example, if the beneficiary was still severely impaired at the time he returned to work but

recovered by the time of a consultative examination, the month of cessation would be the month of the consultative examination rather than the month of work resumption.

353.3 Possible Medical Recovery—No Return to Work

A. *General.*—Cases involving matured medical reexamination diaries and other issues of possible recovery, such as, report of release from a hospital, report of improvement, etc., will be sent directly to State agencies on Form SSA–847 (BDI Request for Case Action). Cases transmitted under this section (where the beneficiary has not reported a return to work) will be noted on Transmittal "Re-Exam Diary, etc. CDI § 353.3".

B. *State Agency Action.*—The SA will review the file in accordance with the following instructions and contact the beneficiary and appropriate medical sources to obtain the evidence that is necessary to determine if disability is continuing or has ceased. When information is received that the beneficiary has returned to work, the SA will utilize the adjudicative concepts under § 353.2.

Occasionally, SA's may find that a medical reexamination should not have been scheduled (§ 347ff). In other cases, the file may reveal that the beneficiary has died so that there is no current CD issue. The SA will return such cases to BDI on route slip Form OAAD–408 (without an SSA–833) with an appropriate notation under remarks such as, "No CD Issue—Beneficiary Died". Include in the folder any supporting evidence; where appropriate, prepare a report of contact (see subsection IIA2b of DIL II–36—Transmittal of Folders to SSA).

1. *Initial State Agency Contact with Beneficiary*—The SA will contact the beneficiary to inform him that it has been requested by SSA to determine whether he continues to be unable to engage in SGA by reason of his impairment and to obtain information concerning: (1) sources of medical treatment, and (2) his participation (including any work) in a State VR program, if any, and (3) his opinion as to whether his condition has improved so that he is able to return to work. This initial contact may be made by mail or telephone.

a. *Contact is by Mail*—Form SSA–454(a) (Social Security Disability Benefit Report) (Exhibit 8a) should be used where the contact is made by mail. Complete the form by entering the SA name and address, the date, the beneficiary's social security number, name, and address, and the SA's director's name (or his designee). A pre-addressed, postage paid envelope should be included. If a reply is not received, an appropriate followup (by mail or phone) should be made as soon as possible but not later than *two* weeks after the initial mailing. If the form is returned and the response is adequate follow § 353.4. If the response is not adequate or not received, develop through the district office in accordance with (B)(2) below.

b. *Contact is by Telephone*—Where the initial contact is made by telephone, the SA should use Form SSA–454(a) as a guide to assure that all pertinent questions are asked. The beneficiary's answers should be recorded on the SSA–454(a) and the form annotated to show that the information resulted from a telephone conversation. Always record the name of the person providing the information on the form. The beneficiary (or payee) should be informed that the information he furnishes (and other information received) will be used to determine his continuing enti-

tlement to disability benefits. Send a copy of the completed SSA–454(a) to the beneficiary for his information, any necessary revision, his signature, and prompt return.

The check-payee (i.e., the beneficiary or his designated representative) is responsible for reporting events affecting payments. In the interest of assuring administrative due process in continuing disability investigations, the SA will initially attempt to conduct the telephone (or mail) contact with such payee. When the SA contact is with someone other than the check-payee, the SA should satisfy itself that he is an acceptable source before requesting information to complete the form, i.e., a competent adult in a position to supply reliable information *on the beneficiary's behalf*. For example, the SA may telephone the beneficiary in an effort to secure information needed to document its continuing disability investigation. The beneficiary's wife residing at the same address answers the phone and explains that the beneficiary is working. She provides full details. As in the preceding paragraph, send a copy of the report to the beneficiary (or representative payee) and ask his confirmation in writing whether the facts reported are accurate.

2. *Requesting DO Assistance.*—There may be situations where the SA is unable to complete its development without the assistance of the district office. When it is necessary to forward a file to the district office, use Form SSA–883 (Request for Evidence or Assistance—Disability Cases) and give an appropriate explanation of development needed.

Situations in which the SA may request district office assistance, will include cases where

The beneficiary has not responded (after appropriate follow-ups by mail or telephone) to requests for information, or

The beneficiary response is inadequate to resolve the issues raised, or

Assistance is needed in securing specific information and the SA believes the DO is in a better position to obtain it.

When a personal contact is made by the DO, an SSA–454 (Report of Continuing Disability Interview) will usually be completed as well as a Form SSA–821 (Work Activity Report) where indicated. Upon completion of its action, the district office will return the folder to the SA. In cases where the DO is unable to contact or locate the beneficiary, the case will be processed in accordance with § 356ff.

353.4 Development of Medical Evidence

A. *Development of Current Evidence.*—1. *Evidence of Record.*—If the beneficiary reports that he has returned to full-time work and there is no indication of significant medical restrictions, no further medical development is needed (§ 353.2B). Otherwise, the SA must develop appropriate evidence from medical sources (such evidence should be developed even though the beneficiary reports that he has recovered sufficiently to be able to engage in SGA). The responsibility for medical development in continuing disability is placed primarily upon the State agencies. If the beneficiary has a current treatment source, that source should always be requested to furnish evidence of record describing the beneficiary's current condition. Even though it may be necessary to request a CE to resolve the question of continuing disability, the presence in file of reports from the beneficiary's medical

sources will better insure that no pertinent evidence has been overlooked and thus insure the soundest possible basis for making determinations.

2. *Consultative Examinations.*—When evidence of record concerning the beneficiary's condition is not available, is not based on a recent examination and for this reason is not convincing about the beneficiary's current condition, or is not sufficiently detailed in terms of signs, symptoms, and laboratory findings to enable a sound independent medical judgment to be made, a consultative examination should be purchased. In selecting a consultative examiner the attending physician should be given first consideration (see § 244). When contacting the attending physician, special care should be exercised to clearly explain the reason for requesting a current examination, i.e., to determine whether the individual may continue to receive disability benefits because he still has a severe impairment, or whether his condition has so significantly improved that he would no longer be entitled to disability benefits. Also explain that his report could be the basis for a decision which would result in the termination of the individual's disability benefits. Some physicians may be very reluctant to serve as the sole or primary source of information which might result in the loss of benefits for their patients. Where the attending physician objects to performing a current examination for the SA, other examination sources should be utilized.

B. *Conflicts Between Beneficiary and His Medical Source.*—Ordinarily, where improvement occurs which permits return to work, this fact will have already been communicated by the attending physician to the beneficiary. If, however, when contacted in accordance with § 353.3B(1), the beneficiary states that his doctor did not recommend that he return to work, or

the beneficiary still feels he is unable to work because of his impairment, but the medical evidence received from his attending physician indicates that the beneficiary is no longer disabled, there is a conflict that needs to be resolved. The sensitivities involved here suggest the need for delicate handling. In some cases it may be desirable to arrange for a CE by an independent medical source before making a determination.

C. *Documenting File.*—Material medical source evidence used to establish that the beneficiary is no longer under a disability should be in writing, signed by the source of the information, and the source should be properly identified. Therefore, when development of such evidence is accomplished by telephone, a copy of the report should be sent to the source for signature and return. An exception can be made where a signed, written report was previously received during the current investigation and it is necessary only to confirm some detail by telephone; here, a report of telephone conversation signed by the SA examiner is sufficient (see §§ 216 and 217).

353.5 Evaluation of Medical Evidence

A. *General.*—Where return to work does not provide a basis for cessation based on SGA after a TWP (§ 352.5), or under the clear-cut concept of medical recovery (§ 353.2B), evidence from medical sources describing the beneficiary's current medical condition (see B below) will be controlling in arriving at a decision. As in the case of establishing entitlement to benefits initially, the relevant medical evidence for determining continuing disability must be sufficiently detailed as to signs, symptoms, and laboratory findings to enable a sound judgment to be made by an independent reviewer of the record. Detail is espe-

cially needed when certain evidence indicates cessation but the beneficiary says that he is unable to return to work because of his impairment, or that his doctor has placed restrictions on how much or what kind of work he may do.

B. *Evaluation Guides for Determining Whether Disability Continues.*—The standards and the evaluation guidelines that apply in determining initial entitlements to benefits also apply for determining whether disability continues. There could be exceptional situations encountered, however, where though the CDI reviewer is of the view that disability does not presently exist, there is evidence that medical improvement has not occurred since the initial disability determination of allowance or the most recent continuance determination. In other words, there may be a question whether the individual was properly entitled to benefits in the first place or whether benefits should have been previously continued. In this situation, absent significant improvement in vocational competence (as described below), the only recourse is reopening the previous favorable determination. This in turn is limited by the rules of administrative finality (see § 277(A)(1)). Such reopening (when requested by BDI) should be done, however, only where the previous determination is wholly unsupportable by the evidence—not just because of differences in judgment. In a rare case, where the medical evidence is such that the question of improvement cannot be resolved, that is, functional loss at the time of the CDI cannot be satisfactorily compared with the functional loss at the time of a previous finding of disability, a determination as to continuing disability may be made on the basis of current assessment of the beneficiary's condition.

Where the beneficiary's medical condition remains unchanged, but his vocational competence has improved significantly, e.g., he has acquired new relevant skills by reason of completing a training course in vocational rehabilitation, a new evaluation in terms of present capacity to engage in SGA would be required in accordance with DIL III–3. (Identify any cessation determination prepared under this paragraph for policy review and route folder to BDI–DDPP in accordance with section II(A)(2)(a) of DIL II–36.)

353.6 Subsequent Contact with Beneficiary Prior to Effectuation of Determination of Cessation on Account of Medical Improvement

A. *Evidence Conflicts with Beneficiary's Allegations.*—Where the medical evidence conflicts in any way with the beneficiary's assessment about the severity of his impairment, or about the date of cessation of such impairment, the beneficiary should be again contacted before a determination of cessation is made. (*Exception:* Where beneficiary was recontacted prior to suspension of benefits (see "C" below) and the same conflict existed at that time, further contact at the point of cessation is not required.) A conflict arises when the beneficiary has informed the SA that his condition has not improved (Item 1(a) of the SSA–454(a) is answered "No") but the medical and other CD evidence justifies a cessation of disability (see § 353.4B). The beneficiary should be informed by mail or telephone of the proposed adverse action, given a brief summary of the evidence on which it is based and a reasonable opportunity (i.e., at least 10 working days) to respond in writing; if he wishes to obtain and submit additional evidence which may be material in support of his claim, he may be granted an additional time (i.e., 20–30 days) to present such evi-

dence. When a telephone call is made, document file with a report of contact.

The objective of the foregoing is to provide a beneficiary who feels he is still disabled with opportunity to present evidence to rebut that already in file showing he is no longer disabled.

When it is necessary to so contact the beneficiary (entitled as a DIB, DWB or CDB) by mail, the model language in subsection B below may be used before adverse action, if any, is taken.

In the alternative the State agency may develop its own letter provided such letter includes all of the following basic points.

Tell beneficiary that we are assisting the SSA in reviewing his case to determine whether he is still unable by reason of his medical impairment from engaging in SGA.

Notify him that based on evidence now in file it appears that a determination would have to be made that he has regained ability to engage in SGA (month/year).

Give in lay terms a brief summary of the evidence and explain why it appears that he has regained ability to engage in SGA.

Explain that we are writing at this time to give him an opportunity if he feels he is still unable to work by reason of his impairment to present any additional evidence he wants us to consider.

Tell him that unless we hear from him within 10 days the State agency will forward his records on to the Social Security Administration where formal determination will be made. Point out that it is important, therefore, that he let us know within 10 days if he wants to submit

a statement or evidence (even though he may need more time to submit it).

Explain that when formal determination is made he will be notified by SSA in writing what the determination is. Also that if it is determined he has regained ability to engage in SGA and therefore that his disability has ceased, he will be eligible to receive benefits for the month in which disability ceased and for each of the two months following that month.

B. *Model Letter.*—"Earlier, we told you we were assisting the Social Security Administration in determining whether you remain eligible to receive monthly benefits on account of disability. To be eligible for such benefits you must be unable to engage in any substantial gainful activity by reason of your impairment.

"On behalf of the Social Security Administration, this is to notify you that based on evidence now in file it appears that a determination would have to be made that you regained ability to engage in substantial gainful activity in—(month/year). (Give in lay terms a brief summary of the evidence and explain why it appears the beneficiary is no longer under a disability. (see § 353.7 for examples.))

"We are writing at this time to give you the opportunity, if you feel that you are still unable to work by reason of your impairment, to present any additional statement or evidence you want to be considered before a determination is made. If you want to submit such a statement or evidence, please send it to us within the next 10 days using the enclosed envelope which requires no postage.

"If you do not write us within 10 days, we will forward your records on to the Social Security Ad-

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ministration where formal determination will be made as to your continuing entitlement to benefits. *It is important, therefore, that you let us know within 10 days if you want to submit a statement or evidence even though you may need more time to submit it.*

"When a formal determination is made, you will be notified in writing by the Social Security Administration what the determination is. If it is determined that you have regained ability to engage in substantial gainful activity and therefore that your disability has ceased, you will be eligible to receive benefits for the month in which disability ceased and for each of the two months following that month."

Contacts with the beneficiaries whether by telephone or by mail should be documented in the file. The SA will set up appropriate diary controls and take action to finalize its determination and send the folder on to BDI at the appropriate time in light of developments. The SA is not ordinarily expected to followup with a beneficiary who fails to respond to the model letter; if there is no response in 15 days, the SA will complete its action. Where the beneficiary does respond to the model letter but requests more time to get additional evidence, the SA should follow up 20 days thereafter if the evidence is not forthcoming. Ordinarily, in such a case, the SA should be in a position to finalize its determination *no later* than the 40th day after the model letter was sent to the beneficiary.

Where additional information is received *and* such information does *not* alter the proposed finding of cessation, the SA will prepare a brief acknowledgement along the following lines. (*Note:* Do not include any statement as to the significance of the information received.)

"This acknowledges receipt of the additional information you sent to us. It will be considered along with

the other evidence in your case in arriving at a determination as to your continuing entitlement. When the formal decision is made, you will be notified by the Social Security Administration."

C. *SA Notice to Beneficiary of Proposed Suspension Action.*—As in "A" above, the SA should always advise the beneficiary (or his respresentative) of any proposed action to suspend benefits (in accordance with § 265.1D), before taking action to recommend suspension to BDI.

353.7 Preparation and Content of "Summary of Evidence" on which a Proposed Cessation or Termination is Predicated

A. *General.*—This section provides guides and instructions for State agency preparation of brief summaries of evidence when it is necessary to contact a beneficiary in accordance with § 353.6. Summaries should be tailored to individual case situations and should be prepared in such a manner as to enable beneficiaries to understand better the reasons for cessation. No meaningful purpose is accomplished by presenting the beneficiary with a list of clinical, laboratory and diagnostic terms. A summary of evidence in proposed cessations can be effectively explained by using the following format:

1. *Medical Evidence.*—State the basis for the initial allowance and briefly explain how the CD evidence shows improvement (i.e., show the extent of restored functions). Translate laboratory, clinical and diagnostic findings in terms of current (work related) physical or mental capacity.

2. *Vocational Evidence.*—Where material to making determination in the case, briefly cite pertinent facts regarding age, education, training, and/or skill level of the beneficiary. Such facts would always be

material where determination is based on the beneficiary's ability to return to other than his usual work.

3. *Reasoning and Conclusion.*—Provide rationale for conclusion that beneficiary has regained ability to engage in SGA.

B. *Examples.*—The following subsection illustrates summaries that can be used.

1. *TB Case.*—You were initially found to be disabled because of tuberculosis. The evidence shows that the medical treatment you have received for tuberculosis has been successful and that you have regained your strength. Although you have stated that you are too short of breath to return to work, special studies recently obtained show that your breathing capacity is good. For this reason it would appear that you are able to return to your usual work.

2. *Back Surgery—Surgery since allowance.*—You were initially found to be disabled because of a back condition. You have stated that your back is still too painful to allow you to return to work. The medical evidence shows you have undergone surgery for correction of this condition and that the surgery was successful with the result that your only present restriction is to avoid heavy lifting. Since your usual occupation does not require heavy lifting, it would appear that you can return to work.

3. *Rheumatoid Arthritis.*—You were initially found to be disabled because of rheumatoid arthritis. The medical evidence in file shows that treatment you have had for your rheumatoid arthritis has been successful. You have stated you are still unable to work because of stiffness and painful joints. Although you do still have some stiffness and occasional pain in the shoulders, the evidence shows your condition overall has improved sufficiently so that you are able to return to your usual work as a bookkeeper.

4. *Fracture Cases—(ability to return to other than usual work, high school education, 34 years of age.)*—Your were initially found to be disabled because of fractures of your right leg and hip. You state that you are unable to go back to your job as a stevedore because your leg has not healed properly. The medical evidence about your present condition shows that your fractures have solidly healed, although you do have some limitation of motion of the hip and knee so that you walk with a limp. We recognize that you may not be able to return to stevedoring because of this condition. However, with your educational background and at your age you should be able to qualify for many types of other work not requiring special skills, nor as much physical exertion, which you should be able to do. Some examples would be machine tending, assembling, and materials packaging.

354.—Special Evaluation Considerations

The following considerations assume particular importance in evaluating continuing disability cases:

A. *Discharge from a Hospital.*—The fact of discharge from a mental institution or tuberculosis sanatorium should not, standing alone, be considered sufficient evidence of medical recovery. Evidence to show current physical or mental status is essential.

B. *Temporary Improvement.*—Improvement that is only temporary does not warrant a finding that recovery has occurred. The probable duration of improvement or recovery and the prognosis should be carefully considered, particularly if the disease is characterized by periods of remission followed by relapse. The file will usually contain pertinent medical information to show the history of the disease process in the individual case. Generally, this information will be helpful in determining the probable duration of

improvement or recovery. All factors must be considered before it is concluded that recovery is not merely temporary.

C. *Examination reflecting Result of Rest.*—Conditions which become comparatively symptom-free after prolonged rest must be given careful consideration. Only where it can reasonably be expected that the improvement can be maintained under ordinary conditions of life in a work setting of the type for which the individual is qualified may a finding of cessation be made.

D. *Medical Regimen.*—Generally, when an individual is hospitalized or a treating physician markedly restricts an individual's activities, the signs, symptoms and laboratory findings will establish that an impairment exists which continues to prevent the individual from engaging in any substantial gainful activity. Hospitalization, prescribed therapy which prevents work, or a judgment by the treating source that the individual should not work are not, in themselves, sufficient evidence to support a finding of continuance. However, in making an independent judgment as to an individual's ability to engage in substantial gainful activity the judgments of the applicant's treating physician should not be dismissed lightly. Careful consideration must always be given to the possibility that the treating physician has additional medical information, not reflected in the file, which might support a finding of continuance. If, however, full development has been undertaken and the evidence does not support a finding of disability under existing policies and regulations, a finding of cessation would be appropriate.

E. *Recommended Treatment not Followed.*—In those cases where the previously recommended treatment has not been instituted, the State agency should

develop all pertinent aspects, particularly with respect to *why* the recommended treatment has not been carried out. Where the evidence establishes that the individual has willfully failed to follow prescribed treatment which could be expected to restore his capacity to engage in substantial gainful activity, a finding of cessation should be made with the month in which the evidence clearly establishes such failure.

354.1 Participation in a State-Sponsored Vocational Rehabilitation Training Program

A. *General.*—One of the objectives of our program is to encourage the rehabilitation of disabled individuals. Consequently, we do not want to interfere unnecessarily with any rehabilitation effort. On the other hand, we are required to discontinue the payment of disability insurance benefits when the medical and vocational evidence clearly establishes regained capacity for substantial gainful activity, whether or not the beneficiary has returned to work.

These guides apply to all cases except that the substantive evidence for a determination for disabled widows and widowers (DWB) must reflect whether severity still meets or equals the medical Listing. When the level of severity no longer meets or equals the Listing of Impairments, cessation is necessary. It is not appropriate to consider vocational factors as is done in the case of disabled workers (DIB) or adult children (CDB) who do not meet the prescribed level of severity. Also, the trial work provisions do not apply to disabled widows and widowers.

B. *Cases in Which Medical Recovery Not Expected.*—Our policy of scheduling medical reexaminations only for specific categories of impairments from which the individual may recover usually permits individuals who are *not scheduled* for future medical

re-evaluations to continue in rehabilitation programs and not have their social security disability benefits terminated until they have demonstrated by actual work activity that they are no longer prevented from engaging in substantial gainful activity.

C. *Cases Involving Potential Medical Recovery.*—When the disabling effects of the individual's impairment may not remain at a severe level, it is necessary to re-evaluate the impairment at a future date to determine whether entitlement to disability benefits continues. In these instances, both the beneficiary and the vocational rehabilitation agency are advised of our plans to conduct a future investigation because of possible medical improvement. The vocational rehabilitation counselor is furnished a copy of the disability determination and the beneficiary is notified when we expect to re-evaluate his entitlement to future benefits. A beneficiary may be in a vocational rehabilitation training program when the continuing disability issue arises.

D. *Vocational Rehabilitation Agency—A Source of Valuable Evidence.*—When an individual is known to a State Vocational Rehabilitation Agency at the time of the continuing disability investigation, evidence from that agency should be obtained before soliciting or purchasing medical evidence. The evidence available through the vocational rehabilitation agency may be sufficient to permit a sound determination as to whether disability continues without purchasing additional evidence or disrupting vocational rehabilitation activity by a medical work-up.

E. *District Office Ascertains Whether Individual is Participating in Vocational Rehabilitation.*—When the continuing disability investigation is made, the district office, at the time of its interview with the individual, will ascertain whether the beneficiary is known

to a State Vocational Rehabilitation Agency, and if so, the name of the counselor and/or the address of the office servicing him, as well as the type of services being received.

F. *State Agency Secures Vocational Rehabilitation Evidence.*—Where the information received from the district office indicates the individual is participating in a State-sponsored vocational rehabilitation program, the State agency should contact the vocational rehabilitation agency for a full report about the individual. The information requested should include medical reports relating to the client's current medical status and other data pertinent to a determination involving an issue of medical recovery. Depending on local circumstances, this information may be obtained in the form of a written statement from the rehabilitation agency or copies of vocational rehabilitation records or it may be recorded on a report of contact as a result of a personal or telephone contact.

If data previously obtained from the vocational rehabilitation agency (e.g., in connection with the initial adjudication or an SSA–853 vocational rehabilitation closure report) indicated that the case was closed and the beneficiary states that his case has not been reopened, a further contact with vocational rehabilitation need *not* be made.

G. *Documentation of Recovery.*—The evidence received from the vocational rehabilitation agency should be considered with all of the other evidence bearing on the beneficiary's ability to perform substantial gainful work. Current medical evidence, including a consultative examination, if necessary, should generally be obtained when the evidence from vocational rehabilitation is not current or sufficient to determine whether disability continues. In no instance can a "clear-cut"

cessation be made without current medical development in accordance with DISM 353.2 where vocational rehabilitation services are continuing since participation in vocational rehabilitation constitutes "evidence to the contrary." Medical recovery may normally be found when current medical evidence establishes a present capacity for engaging in substantial gainful activity. When the medical evidence establishes such capacity, cessation must be found despite the fact that the individual may be an active participant in a State-sponsored vocational rehabilitation program.

H. *Continuance Without Current Medical Evidence.*—There will be instances where the evidence from the vocational rehabilitation agency will be sufficient to permit a finding that disability is in fact continuing without the need for securing current medical evidence. However, a continuance must not be found solely or primarily because the beneficiary is actively participating in vocational rehabilitation. Rather, the evidence must permit a reasonable conclusion that any further medical development would substantiate a continuance.

I. *Completion of Rehabilitation Services.*—Rehabilitation services include surgery or other medical treatment necessary to correct or substantially modify a physical or mental condition, prosthetic devices, training and job placement. Upon completion of vocational rehabilitation services, the vocational rehabilitation agency sends Form SSA–853 (Vocational Rehabilitation Report to SSA) to the Bureau of Disability Insurance. The folder is then screened for any current or potential continuing disability issue. The information contained in the form from the vocational rehabilitation agency may be sufficient to permit the Bureau of Disability Insurance (1) to conclude that no action is necessary, e.g., where closure is unrelated

to work activity; (2) to establish a trial work diary, e.g., when the beneficiary is engaged in trial work and less than 9 months of such work have elapsed (no medical diary case); or (3) to initiate a continuing disability investigation, e.g., where there may be substantial work following 9 months of trial work. A continuing disability investigation may also be necessary when the information provided on the SSA–853, although inconclusive, raises the possibility a continuing disability issue has actually arisen.

J. *Examples.*—1. Claimant was allowed because of a psychiatric impairment. A CDI was made before the reexamination date came due when notice of a return to work was received. The report on the Form SSA–454 (Report of Continuing Disability Interview) disclosed that the beneficiary was employed part time and was also participating in a State-sponsored VR program. The State agency requested medical and vocational data from the VR agency. The evidence showed that the individual had demonstrated improvement and was doing well in his training program; however, he continued to be markedly restricted and further and substantial medical improvement was expected. Although the medical evidence received was oriented toward rehabilitation goals and did not permit a functional assessment, it was sufficient, together with the report of the continuing disability interview and the evidence previously of record, to support a decision of continuance. The team recommended a medical reexamination in 6 months to coincide with the anticipated expiration of the trial work period at which time an investigation of both the medical improvement issue and work activity may be made simultaneously.

2. Claimant was allowed because of multiple fractures and complications which indicated his disabling

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condition would meet the 12-month duration requirement. When the medical reexamination diary came due, the CDI disclosed he was enrolled in a 2-year bookkeeping course under a State-sponsored VR program. The State agency adjudicator obtained evidence from the VR, which included a statement from the counselor that medically he is "O.K."; however, he still had one year remaining in his schooling. The State agency then obtained current medical evidence which clearly established medical recovery. Therefore, a determination of cessation was made.

355.—Grace Period for Termination of Entitlement

CDB and DIB payments (and the period of disability) continue for the month in which disability is for any reason determined to have ceased, and the two succeeding months.

A beneficiary could, therefore, work for a period of 9 months with cessation in the 10th month, and receive payments for the 11th and 12th months. Even if disability cessation is not based on services actually rendered (i.e., it is based on medical recovery, failure to cooperate, etc.) the disability beneficiary (and any auxiliary beneficiaries) will nevertheless receive benefits for the month in which disability ceased plus 2 additional months, or a total of 3 months. Thus, there is a distinction between the month of *cessation* (i.e., when the individual is no longer disabled) and the month of *termination* of both benefit entitlement and the period of disability.

356.—Failure to Cooperate and Whereabouts Unknown—General

There are instances when an individual whose case is being investigated fails, without adequate reason, to cooperate when asked to furnish necessary medical or other evidence or to present himself for a physical

or mental examination. There are instances also when the beneficiary cannot be located at the time of a continuing disability investigation. In these cases, every reasonable effort should be made to locate the individual or have him cooperate. However, when a continuing disability determination is necessary but cannot be made on the medical and vocational evidence of record and the beneficiary has not been located or continues to be uncooperative following complete and appropriate development, cessation may be justified on the basis of failure to submit evidence of continuation of disability.

356.1 Failure to Cooperate

A. *Cessation, When Justified and Proper Date*—Cessation based on failure to submit evidence of continuation of disability as evidenced by an individual's failure to cooperate is justified when (1) a continuance issue cannot be resolved with the evidence of record, (2) efforts to have the beneficiary cooperate in obtaining the necessary evidence have been appropriate and reasonably complete but unsuccessful, and (3) the evidence indicates that in spite of such efforts the beneficiary's failure to cooperate will continue.

In these instances, disability shall be found to have ceased in the month specified by the DO or SA in the first verbal or written request made to the beneficiary telling him that unless he cooperated by a specified date, his benefits might be terminated due to his failure to submit evidence necessary for determining whether he continues to be under a disability.

This means that, before making a determination of cessation, the State agency should be certain that the evidence needed to support a substantive decision is in fact not in file or available, and that every reasonable effort to get it has been made. Preferably, the determination should identify the specific evidence needed

and should explain why it is needed as well as why it cannot be obtained.

B. *Documentation and Activity Before Transmittal to SA.*—The DO is instructed to make every reasonable effort to personally contact the individual. Should direct efforts fail, contact will be attempted through neighbors, friends, auxiliary beneficiaries, relatives, and other parties who may be in possession of information reflecting on the individual's uncooperative attitude or who may be helpful in having the beneficiary comply with the DO's request.

The results of these efforts and any helpful information will be fully set forth in the record in order to adequately confirm the beneficiary's lack of cooperation when such efforts have not been fruitful.

If the beneficiary had not received an explanation by telephone or personal contact regarding the effect of his failure to cooperate, a letter is sent to him telling him that unless he responds by a specific date, his benefits may be terminated because of his failure to submit required evidence of continuation of disability. When these efforts are not productive, the DO requests BDI to suspend benefits and forwards the case to the State agency.

C. *Adequacy of Developmental Efforts.*—The State agency should review the record to satisfy itself that all reasonable attempts have been undertaken by the DO to resolve the issue and that the beneficiary has, in fact, failed or refused to cooperate. Under doubtful circumstances, the case should be returned to the DO for further development accompanied by appropriate guidance and recommendations. The SA may also return cases to the DO for assistance when the issue of failure to cooperate first arises at the SA level, e.g., the beneficiary responds to DO requests for information but later fails to comply with the SA request for a consultative examination.

In determining whether the beneficiary has failed to cooperate without adequate reason, attention must be given to the possibility that the very nature of the beneficiary's impairment may be a valid reason for preventing him from cooperating. In cases involving psychiatric impairments, the circumstances surrounding the failure to cooperate issue should be resolved in accordance with DISM 248E and 248F.

D. *Determination Based on Medical and Other Evidence.*—While failure on the part of the beneficiary to cooperate by not submitting the required evidence will generally constitute sufficient basis for cessation of disability, an independent assessment of the medical and other evidence of record should be made and consideration given to whether a sound determination of continuance or cessation is warranted on the evidence of record.

Wage or self-employment postings or information obtained by the DO from an employer may be sufficient to provide a basis for evaluating work issues in accordance with DISM 330 and 352. Where it appears that average earnings are in excess of $140 a month over 9 or more months (SE earnings in excess of $1680), do not find cessation on the basis of failure to submit evidence of continuation of disability. Rather, assume continuous work beginning with the first month of the first quarter posted (or the month in which the work was reported to have begun) and find cessation effective (1) with the apparent tenth month of work, or (2) with the apparent first month of work if the individual is not entitled to a 9-month trial work period.

However, if cessation on the basis of failure to submit required evidence is clearly supported in an earlier month, it is proper to find cessation on that

basis rather than with the month justified by the evidence of work activity.

In some cases in which there is an issue of continuing disability, the failure of the beneficiary to cooperate in the continuing disability investigation will not necessarily prevent further development by the SA. The necessary evidence may be available from a medical source or from an employer and may be obtained without the cooperation of the beneficiary.

Example: A come-in letter dated February 5, 1967, was sent to a beneficiary recently discharged from a TB hospital requesting that he visit the district office. The beneficiary did not respond. All efforts to get him to cooperate were unsuccessful. A letter was sent explaining the possibility of termination of benefits if he did not get in touch with the district office by March 10. When he did not respond, the district office requested suspension of benefits and forwarded the file to the State agency for a determination. The State agency requested current medical evidence from the tuberculosis hospital and received a discharge medical summary. This hospital report established that the beneficiary's capacity for work was considered to be 8 hours per day at the time of discharge in January 1967. The SA therefore prepared a determination of cessation based on medical recovery with a finding that the beneficiary's disability ceased January 1967.

E. *Determination Based on Failure to Submit Evidence of Continuation of Disability (Failure to Cooperate).*—When a beneficiary has failed to cooperate and a determination cannot be made on the medical and/or vocational evidence of record, a cessation of disability is prepared based on failure to submit required evidence of continuation of disability. The de-

termination should enumerate all written and verbal efforts made to have the beneficiary cooperate, the dates such efforts were made, the beneficiary's response or lack of response to them, and it should explain the justification for the cessation action (§ 356.1A).

Example: A CDI was initiated when a medical reexamination diary matured in a nonmental case. A come-in letter dated February 15, 1967, was sent to the beneficiary. When the individual did not respond within the next 10 days, a telephone call was made by a claims representative. The beneficiary stated that he did not wish to come to the DO since he was still disabled. A visit was then made to the beneficiary's home by a DO representative but the individual refused to talk to him. A letter was sent on March 12, 1967, informing the beneficiary that unless he complied within 1 week with our request to appear at the DO, his benefits might be terminated due to his failure to submit evidence necessary for determining whether he continues to be under a disability. When the beneficiary failed to respond, auxiliary beneficiaries were contacted. They said the beneficiary was capable of going to the DO and that he is a very obstinate person but not a mental case. The folder was then sent to the SA with the full documentation of all DO efforts and results, including information that they requested suspension of benefits. The evidence of record did not permit a determination on the basis of medical recovery or work activity. Consequently, the SA found cessation on the basis of failure to submit evidence of continuation of disability as evidenced by his failure to cooperate. The month of cessation was March 1967, as "specified" in the DO letter.

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356.2—Whereabouts Unknown

A. *Cessation, When Justified, and Proper Date.*—Cessation based on failure to submit evidence of continuation of disability as evidenced by an individual's whereabouts being unknown is justified when (1) a continuing disability determination is necessary (§ 351), (2) a decision cannot be made on the basis of the medical and other evidence of record, and (3) following appropriate attempts to locate the beneficiary, his whereabouts remain unknown. In these instances, disability shall be found to have ceased effective with the first month in which there was knowledge that the beneficiary's whereabouts were unknown but no earlier than the month in which a continuing disability issue arose.

B. *Documentation and Activity Before Transmittal to SA.*—When a beneficiary cannot be located at his last known address, the DO attempts to ascertain the individual's whereabouts through the postmaster and through personal visits with individuals who may know the whereabouts of the beneficiary, e.g., landlord, merchants, neighbors, and auxiliary beneficiaries. All efforts to locate the individual are fully recorded and when development is complete but unproductive, the folder is returned to BDI.

BDI reviews the folder first to determine whether a continuing disability issue actually exists and if so, whether a decision can be reached on the medical and other evidence of record. If further contact with the beneficiary is necessary before such a decision can be made, BDI will take whatever further action may be appropriate. The name and address of recent employers may be identified or the address on self-employment tax returns may be ascertained so that additional efforts may be made by the district office to locate

the beneficiary through an employer contact or at a home address not previously known.

Those cases in which a continuing disability determination is needed, and no further leads are uncovered for the DO to develop, are sent to the State agency. Where indicated, benefits are suspended by BDI.

C. *State Agency Action.*—Except for the development of medical evidence which is the primary responsibility of the SA, whereabouts unknown cases will ordinarily be adequately developed in other respects when they are received in the State agency. The SA may be able to resolve the continuing disability issue through medical development if there is a likelihood that the evidence available may be determinative. For example, in the case of an individual who has eloped from a TB hospital, medical evidence from that institution may establish that the beneficiary's condition was still disabling when he left or it may show that he had actually recovered and discharge was imminent at the time of his disappearance. (See example under § 356.1D above.)

Example: A come-in letter dated February 1967 was sent to a beneficiary (multiple fractures) requesting that he visit the DO as a result of a matured medical re-examination diary. The letter was returned March 1967 by the Post Office as undeliverable. The DO attempted to ascertain the beneficiary's whereabouts by contacting the postmaster, neighbors, and auxiliaries but was unsuccessful. The file was subsequently returned to BDI. A search in central office did not turn up any additional information. Since the beneficiary's impairment is the type for which recovery is considered likely, a medical issue existed. Therefore, the file was forwarded to the State agency for a determination. The SA prepared a determination effecting

a cessation date of March 1967, when it first became known, after a continuing disability issue arose, that the individual's whereabouts was unknown.

D. *Determination Based on Failure to Submit Evidence of Continuation of Disability (Whereabouts Unknown).*—When a cessation of disability is prepared based on failure to submit evidence of continuation of disability as evidenced by an individual's whereabouts being unknown, the determination should enumerate the event which started the CD investigation, all efforts made to locate the beneficiary, the dates and results of the efforts made, and an explanation of the justification for the cessation action (§ 356.2A).

356.3 Reopening Subsequent to Termination

An individual whose disability benefits have been terminated as a result of failure to cooperate or whereabouts unknown may subsequently contact us and agree to submit evidence or undergo an examination. The reopening procedures will apply and the proper action to be taken is dependent upon the new evidence.

A. The evidence may show that the date of the earlier cessation was correct, i.e., that the month in which failure to cooperate or whereabouts unknown was established is the same month now justified by the medical and other evidence. A new SSA–833 should be prepared affirming the earlier SSA–833 cessation date but changing the basis for cessation from "failure to cooperate" or "whereabouts unknown" to either demonstrated ability to engage in SGA or to impairment no longer of sufficient severity.

B. The evidence may show the person has recovered or demonstrated the ability to engage in SGA but later than the month of cessation previously established as a result of failure to cooperate or whereabouts unknown. In such situations a new SSA–833 should be

prepared to reflect the later cessation date and the new basis for cessation established by the current evidence.

C. The evidence may show that (1) the cessation month previously found needs to be changed, and (2) the person is now disabled. In this instance a new SSA–833 should be prepared to reflect the cessation date established by the latest evidence, and a new period of disability established on an SSA–831 in the usual manner (DISM 267).

D. The evidence obtained currently when reviewed with the prior evidence establishes that the person has been continuously disabled. In this type of case a new SSA–833 should be prepared to reflect a continuance.

Form SSA-a21a — Exhibit 3a

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21241

BUREAU OF DISABILITY INSURANCE

REPLY TO: DI:CE

Date

Social Security Number

Our records show:

☐ That you have worked since _____.

☐ $ _____ has been reported to your social security record for the period beginning _____.

As you were notified, your benefits may be stopped if you are again able to do substantial gainful work. Your medical condition may have improved enough for you to do this. But even if your condition has not improved your work may show that you now have the ability to do substantial gainful work.

The amount of your earnings is important in determining whether you are able to engage in substantial gainful work. The general rule is that if your earnings average more than $140 a month (your pay before payroll deductions), you are performing substantial gainful work. Unless you submit information that establishes that you do not have the ability to engage in substantial gainful work, a determination will be made that you are no longer under a disability and your benefits will be terminated.

Please answer the questions on the next three pages. Sign your name at the bottom of the last page. In order to prevent possible overpayments of benefits to you return the form promptly. Please use the postage-free envelope enclosed. Unless this form is returned within the next 10 days your benefits may be suspended based on the information already in your file. If you need more time please let us know.

If you have any questions, or need help in filling out the form, please telephone or visit any social security office. The people there will be happy to help you. You can find the telephone number and address in the telephone directory listed under "Social Security Administration," or you can ask at your local post office. If you visit the social security office, please take this letter with you.

Sincerely yours,

C. C. Hall
Assistant Director

Enclosure:
Pre-Addressed Envelope

SSA-L821(a) (6-72)

Form SSA—a21a — Exhibit 3a (Cont.) 1

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF DISABILITY INSURANCE

Form Approved.
OMB No. 72-R0861

REPORT OF WORK ACTIVITY—CONTINUING DISABILITY

I understand that this report will be used to determine whether to continue or to stop my disability cash benefits and that evidence of continuing entitlement with respect to all matters must be submitted promptly, otherwise my benefits may be suspended based on the evidence already in file. Also, I understand that if the work as I describe it does not establish that I am able to engage in substantial gainful work activity, I will be found to be no longer under a disability and my benefits will be terminated.

1. Have you worked at any time since the date shown in the first paragraph of the preceding page?

☐ Yes If "yes", be sure to answer all the following questions. If any question does not apply to you, please explain in the space for remarks (number 10 on page 4)

NOTE:

☐ No If "no", skip questions 2 to 8 and go to question 9 page 4. (If earnings have been reported to your social security record - see amount entered in the first paragraph of the preceding page - but you have not worked, please explain in the space for remarks number 10 on page 4. For example state if the amount reported represents sick pay, vacation pay, etc.) If you cannot account for the reported earnings, please telephone or visit your social security office.

2. Please furnish the information requested about your present or most recent employer. Use paragraph 7 on page 3 to list any other employers you worked for since the date shown in the first paragraph of the preceding page.

NAME OF EMPLOYER

EMPLOYER'S ADDRESS

DATE YOU STARTED WORKING FOR THIS EMPLOYER	MONTH	DAY	YEAR

3. My total earnings (before payroll deductions) are

Per Week $ _____ or Per Month $ _____ or Per Hour $ _____

I am working _____ hours per week or _____ per day.

4. Since you started working for this employer, have there been any months in which your total monthly earnings (before any deductions) were $50 or less?

☐ No ☐ Yes If "yes", list each month and the amount earned that month.

5. Are you still working for this employer? ☐ Yes ☐ No

If no, when did you stop working for this employer?	MONTH	DAY	YEAR

Explain why you stopped working

Form SSA-821(a) (6-72) - 2 -

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6.

A. What is your Job Title?

B. Briefly describe your duties

7. If you have worked for other employers since the date shown in the letter on top of this form please furnish the following information for each employer.

(a) Name of employer	(b) Address of employer
(c) Dates of employment	(d) Earnings per month before deductions

(e) Any months where you earned $50 or less

(Use paragraph 10 on page 4 if you need additional space for describing work for other employers.)

8 (a) Has your doctor told you to limit your activities in any way?

☐ No ☐ Yes ☐ Did not say

(b) *If "Yes", give the name of the doctor and what he told you about limiting your activities.*

(c) When did your doctor tell you this?

(d) Does your impairment affect your ability to do your work?

☐ No ☐ Yes *(If yes, explain how.)*

9. Are you receiving services from or through the State vocational rehabilitation agency?

☐ No ☐ Yes *If "Yes," give*

Name and address of servicing rehabilitation office and counselor.

10. Remarks Use the space below for explanation of question number one. Also, enter here any additional information that you believe is important and will assist in the review of your continuing entitlement to social security disability benefits. *(If you need more space, use a separate sheet of paper. Also, if you wish, you may attach any evidence that shows your current condition.)*

11. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review your entitlement for continuing disability benefits, any medical records or other information about your disability? ☐ Yes ☐ No

I certify that the above statements are true, correct, and complete to the best of my knowledge. I know that anyone who fraudulently conceals or fails to report a disqualifying event or who makes a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act could be subject to a fine or imprisonment or both.

SIGN YOUR NAME AS YOU USUALLY WRITE IT	DATE	PHONE NUMBER
➡		

If the address shown on page one of this form is incorrect or incomplete, please enter your present address here.

NUMBER AND STREET, APT. NO., P.O. BOX OR RURAL ROUTE

CITY	STATE	ZIP CODE

If we need more information after you send this form back to us, someone from the social security office or from the State agency that works with us on making disability decisions will get in touch with you.

Form SSA-454a Social Security Disability Beneficiary Report — Exhibit 8a (page 1 of 4) cont.

Refer to
Social Security Number — Date

When your disability payments began, you were notified by the Social Security Administration that your condition might improve and your claim was scheduled for a future review. The Social Security Administration has requested us to develop current evidence as to whether your condition still prevents you from working.

To help us determine whether you are still entitled to disability benefits, please answer the questions on the next three pages, sign your name at the bottom, and return the form within ten days using the enclosed envelope which requires no postage.

If at any time medical evidence shows that your condition has improved so much that you are no longer disabled, you will still receive benefits for a 3-month period of adjustment. This period includes the month in which your condition improves and 2 additional months. Benefits will then be stopped.

If you have questions or need help in filling out the questionnaire, please telephone or visit any social security office. You can find the address in the telephone directory under "Social Security Administration," or ask at your local post office. If you visit the social security office, please bring this letter with you.

Sincerely yours,

Form SSA-454a Social Security Disability Beneficiary Report — Exhibit 8a (page 2 of 4) cont.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF DISABILITY INSURANCE

Form Approved.
OMB No. 72-R0910

SOCIAL SECURITY DISABILITY BENEFICIARY REPORT

I understand that this report will be used to verify my continuing eligibility to benefits and should it be determined that I am no longer entitled, benefits will be terminated.

INSTRUCTIONS FOR COMPLETING THE FORM

Answer each question as fully as possible.

If any question does not apply to you, write "none" in the space provided.

If you need more space to answer a question, use the back of this form or a separate sheet of paper. If you use a separate sheet of paper, please be sure to put your social security claim number on it.

Answer all parts of the following questions:

1. (a) Do you feel your medical condition has improved so that you are able to return to work?

☐ Yes ☐ No If No, explain below.

(b) Has your doctor told you that you are able to return to work?

☐ He said Yes If the answer is yes, when? _____ (give date)

☐ He said No ☐ He did not say

(c) Has he placed any significant restrictions on the kind of work you may do or how many hours a day you may work?

☐ No ☐ Yes If Yes, explain below

Describe below in your own words your present condition: be sure to list what you believe you are unable to do in terms of lifting, bending, pushing, etc., that interferes with your working again.

Form SSA-454(a) (6-72)

Form SSA–454a Social Security Disability Beneficiary Report — **Exhibit 6a (page 3 of 4) cont.**

2. Give name, address and telephone number of your physician(s) and of the hospital or clinic where you have received treatment for the condition that prevented you from working.

(a) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER
(b) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER
(c) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER

3. Have you worked in the past 12 months?

☐ No ☐ Yes *If "Yes," be sure to complete all of the following items.*

(a) NAME, ADDRESS AND TELEPHONE NUMBER OF EMPLOYER	(b) KIND OF WORK DONE	
(c) WHEN STARTED (Date)	(d) AVERAGE HOURS WORKED PER DAY	PER WEEK
	(e) AVG. GROSS EARNINGS (Before payroll deduct.) PER DAY	PER WEEK

(f) ARE YOU STILL WORKING?

☐ Yes ☐ No *If "No," explain below why and give date you stopped working.*

Form SSA–454a Social Security Disability Beneficiary Report — **Exhibit 6a (page 4 of 4)**

4. (a) Are you receiving services from or through the State vocational rehabilitation agency?

☐ No ☐ Yes *If "Yes," answer question (b)*

(b) Name and address of servicing rehabilitation office and counselor.

5. **Remarks.** Enter here any additional information that you believe is important and will assist in the review of your continuing entitlement to social security disability benefits. *If you need more space, use a separate sheet of paper. Also, if you wish, you may attach any evidence that shows your current condition.)*

6. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review your entitlement for continuing disability benefits, any medical records or other information about your disability?

☐ Yes ☐ No

I certify that the above statements are true, correct, and complete to the best of my knowledge. I know that anyone who fraudulently conceals or fails to report a disqualifying event or who makes a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act could be subject to a fine or imprisonment or both.

SIGN YOUR NAME AS YOU USUALLY WRITE IT	DATE	PHONE NUMBER
▶		

If the address shown on page one of this form is incorrect or incomplete please enter your present address below

NUMBER AND STREET, APARTMENT NO., P.O. BOX, OR RURAL ROUTE

CITY	STATE	ZIP CODE

U.S. GOVERNMENT PRINTING OFFICE : 1974 O–556–468

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
FEB 27 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-204

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 29, 1974
CERTIORARI GRANTED JANUARY 13, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-204

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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567-895—75——1

Relevant Docket Entries

1972

August 3 Complaint filed at 1:30 p.m. this day. Summons issued and mailed to U.S. Marshal in Roanoke for service on defendant, Attorney General and U.S. Attorney.

August 14 USM–285 filed with U.S. Marshal's return of service on August 9, 1972, endorsed thereon.

November 27 Filed Motion to Dismiss, Affidavit of Bernard Popick, and Defendent's Brief in Support of Motion to Dismiss and/or Motion for Summary Judgment.

February 9, 1973 Filed Notice and Motion by Plaintiff's attorney this day.

February 13, 1973 Filed Order dated February 13, 1973 that the said Social Security disability benefit payments be forthwith reinstated as of the date said benefits were terminated, and shall continue until the final determination by this Court of this cause on its merits; and that the said payments shall be made to the petitioner and that said petitioner shall not be held liable for the refund of any portion of same, should the eventual determination of this claim be adverse to him. *CIV. OB. No. 17, p. 368.* Certified copies hereof delivered to Donald E. Earles, Esq. and Birg E. Sergent, Esq. Mr. Sergent will distribute copies to the Social Security Administration.

March 20, 1973 Filed Defendant's Supplemental Motion to Dismiss or, in the Alternative, for Summary Judgment; Affidavit of Bernard Popick; and Supplemental Brief in Support of Defendant's Motion to Dismiss.

April 9, 1973 Filed Opinion and Order dated April 6, 1973 that the Secretary's motion to dismiss is denied and the case is remanded to the Secretary for the payment of disability benefits and for further proceedings not inconsistent with this opinion. *CIV. O.B. No. 18, p. 41.* Certified copies hereof mailed to Carl E. McAfee, Esq. and Birg E. Sergent, Asst. U.S. Attorney.

May 30, 1973 Notice of Appeal filed this day. Copies hereof mailed to Birg E. Sergent, Carl E. McAfee, Esq. and William Kenneth Slate, Clerk, U.S. Court of Appeals.

July 13, 1973, record on appeal in one volume filed and appeal docketed.

September 14, 1973, appellee's motion to dismiss appeal filed.

September 20, 1973, appellant's opposition to appellee's motion to dismiss filed.

September 25, 1973, appellee's response to appellant's opposition of appellee's motion to dismiss, filed.

September 26, 1973, twenty-five (25) copies of the appellant's brief filed.

October 15, 1973, twenty-five (25) copies of the appellee's brief filed.

October 29, 1973, motion for leave to file in forma pauperis the brief of Caroline Williams as amicus curiae filed.

November 5, 1973, brief of amicus curiae filed, four copies.

November 7, 1973, order denying motion to dismiss filed.

November 14, 1973, appellant's motion for leave to file supplemental brief in reply to brief of amicus curiae, Caroline Williams, filed. Motion granted.

November 14, 1973, appellant's supplemental brief in reply to brief of amicus curiae, Carolyn Williams, filed, 25 copies.

February 2, 1974, stipulation by counsel to argue cause before a two-judge panel filed.

ARGUMENT OF CAUSE, February 7, 1974 (February Session, 1974). Cause came on to be heard before Bryan, Senior Circuit Judge, and Butzner, Circuit Judge, and was argued by counsel and submitted.

April 1, 1974, judgment of the district court affirmed. Judgment filed.

In the United States District Court for the Western District of Virginia, Abingdon Division

Complaint

Civil Action No. 72–C–167–A—Filed, Aug. 3, 1972

I.

That the said Elliot Richardson is the Secretary of Health, Education and Welfare, having been duly appointed by the President of the United States and as Secretary of Health, Education and Welfare for the United States is in charge of the disbursement of Disability Insurance Benefits applicable under the Social Security Act, as amended.

II.

That your undersigned plaintiff, George H. Eldridge, was on June 3, 1968, awarded Disability Insurance Benefits under Section 216(i) and 223 respectively under the Social Security Act, as amended, having been awarded the aforementioned benefits as a result of a hearing before Louis G. LaVecchia, Hearing Examiner, Knoxville, Tennessee, and was awarded Disability Insurance Benefits on the 3rd day of June, 1968. A copy of the Hearing Examiner's Decision is attached hereto and made a part of your undersigned's complaint.

III.

That your undersigned further alleges that on July 1, 1972 the Department of Health, Education and Welfare, Social Security Administration, stopped and your undersigned plaintiff received notice of stopped payments sometime after July 1, 1972, and a copy of the said notice is attached hereto and made a part of this Complaint.

IV.

Your undersigned plaintiff further alleges that the said Department of Health, Education and Welfare, Social Security Administration, had no authority to stop benefit payments to your undersigned plaintiff, his wife and children because the aforementioned payments had been previously fixed by the Social Security Administration and that your undersigned plaintiff had borne the burden of proof in establishing his disability commencing on November 1, 1967, which award the Social Security Administration did not appeal or contest.

V.

Your undersigned plaintiff further alleges that the Secretary of the Social Security Administration has and presently has sufficient funds on which to continue the payment unto your undersigned plaintiff pending a reexamination of the physical condition of your undersigned plaintiff.

VI.

Your undersigned plaintiff further alleges that in July, 1972 your undersigned plaintiff, through his attorney, requested medical reports and information relied upon by the Social Security Administration for the stopping of disability payments; however, your undersigned plaintiff alleges as of this date there have been no medical reports provided your undersigned.

VII.

Your undersigned plaintiff further alleges that the Secretary of Health, Education and Welfare, has no authority to stop the payments unto your undersigned plaintiff without first affording your undersigned plaintiff an opportunity to be heard and your plaintiff further alleges that undue financial hardships have been created as a result of the stopping of payments in July of 1972 and that these financial hardships have continued and that your undersigned plaintiff has several infant children,

all of whom are in school and that the wife of your undersigned plaintiff is physically incapable and is presently unable to seek employment.

WHEREFORE, your undersigned plaintiff prays that the said respondent, Elliot Richardson, Secretary of Health, Education and Welfare, be commanded to immediately transmit unto your undersigned plaintiff, his wife and infant children the disability benefits checks for the month of August, 1972 and all subsequent months thereafter until such time as your undersigned plaintiff is afforded a hearing under the alleged change of condition claimed by the Department of Health, Education and Welfare and your plaintiff shall be granted such other relief.

GEORGE H. ELDRIDGE,

By Counsel.

CLINE, MCAFEE, ADKINS & GILLENWATER
Attorneys at Law,
Professional Arts Building,
Norton, Virginia,
By Carl E. McAfee,
Counsel for Plaintiff.

In the United States District Court for the Western District of Virginia At Abingdon

Motion to Dismiss

Civil Action No. 72-C-167-A—Filed, Nov. 17, 1972

The defendant, Secretary of Health, Education and Welfare, by counsel, moves that this case be dismissed.

An Affidavit of Bernard Popick, Director, Bureau of Disability Insurance; and a brief in support of the government's motion to dismiss is filed herewith this motion and made a part hereof.

The case should be dismissed since the claimant's benefits were terminated pursuant to lawful regulations of the Secretary of Health, Education and Welfare, which regulations do

not violate due process. The claimant has not exhausted his administrative remedies and has an adequate remedy through the administrative process.

Respectfully submitted,

ELLIOTT L. RICHARDSON,
Secretary of Health,
Education and Welfare,
By BIRG E. SERGENT,
Assistant United States
Attorney.

Of Counsel:
PAUL MERLIN,
Chief of Litigation,
HENRY EIGLES,
Attorney,
Social Security Division,
Office of General Counsel,
Dept. of Health, Education and Welfare.

In the United States District Court for the Western District of Virginia

Civil Action No. 72-C-167A—Filed Nov. 17, 1972

Affidavit of Bernard Popick

BALTIMORE COUNTY }
State of Maryland } *ss*:

I, Bernard Popick, being duly sworn, depose and say as follows:

(1) I am the Director of the Bureau of Disability Insurance of the Social Security Administration, the Bureau of the Administration responsible for administering the Disability Insurance Program.

Part I

(2) The Disability Insurance State Manual (the operating manual for State Agencies [1] in their administration of the dis-

[1] By agreement between a State and the Secretary of Health, Education, and Welfare pursuant to Section 221 of the Social Security Act, 42 U.S.C. 421, the State vocational rehabilitation agency assists the Secretary in making disability determinations for Title II purposes.

ability program of the Social Security Administration) contains the following policies and procedures applicable to this case with regard to adjudication of cessation (due to medical recovery) of entitlement to a period of disability and disability insurance benefits which had been previously established under sections 216(i) and 223 of the Social Security Act, 42 U.S.C. 416(i) and 423. Such policies and procedures became effective in accordance with revisions issued February 25, 1972.

353.1 General

A determination that disability has ceased will be made where the medical and vocational evidence establishes a capacity for substantial gainful activity, whether or not the beneficiary returns to work.

Issues of medical recovery generally arise in cases which have been scheduled for medical reexamination in accordance with § 347ff. When the reexamination date is reached, a continuing disability investigation will usually be initiated. The following sections govern the development and adjudication of continuing disability cases involving issues of medical recovery.

* * * * *

353.3 Possible Medical Recovery—No Return to Work

A. *General.*—Cases involving matured medical reexamination diaries and other issues of possible recovery, such as, report of release from a hospital, report of improvement, etc., will be sent directly to State agencies * * *.

B. *State Agency Action.*—The SA will review the file in accordance with the following instructions and contact the beneficiary and appropriate medical sources to obtain the evidence that is necessary to determine if disability is continuing or has ceased. * * *.

1. *Initial State Agency Contact with Beneficiary*—The SA will contact the beneficiary to inform him that it has been requested by SSA to determine whether he continues to be unable to engage in SGA by reason of his impairment and to obtain information concerning: (1) sources of medical treatment, and (2) his participation (including any work) in a State VR program, if any,

567-695—75——2

and (3) his opinion as to whether his condition has improved so that he is able to return to work. This initial contact may be made by mail or telephone.

a. *Contact is by Mail*—Form SSA–454(a) (Social Security Disability Benefit Report) * * * should be used where the contact is made by mail. Complete the form by entering the SA name and address, the date, the beneficiary's social security number, name, and address, and the SA's director's name (or his designee). A preaddressed, postage paid envelope should be included. If a reply is not received, an appropriate followup (by mail or phone) should be made as soon as possible but not later than *two* weeks after the initial mailing. If the form is returned and the response is adequate follow § 353.4. * * *.

* * * * *

353.4 Development of Medical Evidence

A. *Development of Current Evidence.*—

1. *Evidence of Record.*—* * * The responsibility for medical development in continuing disability is placed primarily upon the State agencies. If the beneficiary has a current treatment source, that source should always be requested to furnish evidence of record describing the beneficiary's current condition. Even though it may be necessary to request a CE to resolve the question of continuing disability, the presence in file of reports from the beneficiary's medical sources will better insure that no pertinent evidence has been overlooked and thus insure the soundest possible basis for making determinations.

2. *Consultative Examinations.*—When evidence of record concerning the beneficiary's conditions is not available, is not based on a recent examination and for this reason is not convincing about the beneficiary's current condition, or is not sufficiently detailed in terms of signs, symptoms, and laboratory findings to enable a sound independent medical judgment to be made, a consultative examination should be purchased. * * *.

* * * * *

353.5 Evaluation of Medical Evidence

A. *General.*—* * * As in the case of establishing entitlement to benefits initially, the relevant medical evidence for determining continuing disability must be sufficiently detailed as to signs, symptoms, and laboratory findings to enable a sound judgment to be made by an independent reviewer of the record. Detail is especially needed when certain evidence indicates cessation but the beneficiary says that he is unable to return to work because of his impairment, or that his doctor has placed restrictions on how much or what kind of work he may do.

B. *Evaluation Guides for Determining Whether Disability Continues.*—The standards and the evaluation guidelines that apply in determining initial entitlement to benefits also apply for determining whether disability continues. * * *.

* * * * *

353.6 *Subsequent Contact with Beneficiary Prior to Effectuation of Determination of Cessation on Account of Medical Improvement*

A. *Evidence Conflicts with Beneficiary's Allegations.*—Where the medical evidence conflicts in any way with the beneficiary's assessment about the severity of his impairment, or about the date of cessation of such impairment, the beneficiary should be again contacted before a determination of cessation is made. * * * A conflict arises when the beneficiary has informed the SA that his condition has not improved (Item 1(a) of the SSA–454 (a) is answered "No") but the medical and other CD evidence justifies a cessation of disability (see § 353.4B). *The beneficiary should be informed* by mail or telephone *of the proposed adverse action, given a brief summary of the evidence on which it is based and a reasonable opportunity* (i.e., at least 10 working days) *to respond in writing;* if he wishes to obtain and submit additional evidence which may be material in support of his claim, he may be granted an additional time (i.e., 20–30 days) to present such evidence. When a telephone call is made, document file with a report of contact.

The objective of the foregoing is to provide a beneficiary who feels he is still disabled with opportunity to present evidence to rebut that already in file showing he is no longer disabled. * * * (Emphasis supplied.)

* * * [The] letter [shall] include * * * all of the following basic points.

Tell beneficiary that we are assisting the SSA in reviewing his case to determine whether he is still unable by reason of his medical impairment from engaging in SGA.

Notify him that based on evidence now in file it appears that a determination would have to be made that he has regained ability to engage in SGA (month/year).

Give in lay terms a brief summary of the evidence and explain why it appears that he has regained ability to engage in SGA.

Explain that we are writing at this time to give him an opportunity if he feels he is still unable to work by reason of his impairment to present any additional evidence he wants us to consider.

Tell him that unless we hear from him within 10 days the State agency will forward his records on to the Social Security Administration where formal determination will be made. Point out that it is important, therefore, that he let us know within 10 days if he wants to submit a statement or evidence (even though he may need more time to submit it).

Explain that when formal determination is made he will be notified by SSA in writing what the determination is. Also that if it is determined he has regained ability to engage in SGA and therefore that his disability has ceased, he will be eligible to receive benefits for the month in which disability ceased and for each of the two months following that month.

B. *Model Letter*

Earlier, we told you we were assisting the Social Security Administration in determining whether you remain eligible to receive monthly benefits on account of disability. To be eligible for such benefits you must be unable to engage in any substantial gainful activity by reason of your impairment.

On behalf of the Social Security Administration, this is to notify you that based on evidence now in file it appears that a determination would have to be made that you regained ability to engage in substantial gainful activity in—(month/year). (Give in lay terms a brief summary of the evidence and explain why it appears the beneficiary is no longer under a disability. (See § 353.7 for examples.))

We are writing at this time to give you the opportunity, if you feel that you are still unable to work by reason of your impairment, to present any additional statement or evidence you want to be considered before a determination is made. If you want to submit such a statement or evidence, please send it to us within the next 10 days using the enclosed envelope which requires no postage.

If you do not write us within 10 days, we will forward your records on to the Social Security Administration where formal determination will be made as to your continuing entitlement to benefits. *It is important, therefore, that you let us know within 10 days if you want to submit a statement or evidence even though you may need more time to submit it.*

When a formal determination is made, you will be notified in writing by the Social Security Administration what the determination is. If it is determined that you have regained ability to engage in substantial gainful activity and therefore that your disability has ceased, you will be eligible to receive benefits for the month in which disability ceased and for each of the two months following that month. (Emphasis original.)

(3) The Claims Manual of the Social Security Administration (the operating manual for administrative Social Security District Office personnel in the administration of Title II of the Social Security Act) contains provisions which complement the above provisions of the Disability Insurane State Manual. In pertinent part this provides as follows:

6705.1 Issues of Medical Recovery Including Medical Reexamination Diary Procedures

(a) General

* * * * *

Medical recovery issues, including matured medical examination diary cases, are sent by BDI directly to State agencies (SA) for development and adjudication. The SA contacts the beneficiary to determine his current treatment sources and his opinion as to his medical condition and its effect on his ability to work. When the contact is by mail, the beneficiary is asked to complete Form SSA–454(a) (Social Security Disability Beneficiary Report). * * *.

When the medical evidence conflicts *in any way* with the beneficiary's assessment about the severity of his impairment, or about the date of cessation of such impairment, the SA again contacts the beneficiary before requesting suspension or preparing a determination of cessation. It informs him of the proposed suspension or cessation, the reasons therefor, and his right to rebut the proposed action. After the beneficiary has had the opportunity to submit rebuttal evidence and/or all conflicts are resolved, a determination is prepared and the file is forwarded to BDI. There are two instances in which the DO will become involved: (1) when the SA requires DO assistance (subsection (c) below), and (2) when the beneficiary feels he needs help and calls or visits the DO (see subsection (b) below).

(b) Beneficiary Requests DO Assistance

(1) SA CONTACT IS BY MAIL

Form SSA–454(a) contains the statement—"If you have any questions, or need help in filling out the questionnaire, please telephone or visit any social security office." Hence, when the beneficiary contacts the DO for assistance, the DO should provide whatever assistance is needed to complete this form. If a beneficiary comes to the DO without this form, the DO should utilize Form SSA–454 (Reports of Continuing Disability Interview (see § 6749)) and, if needed, Form SSA–821 (Work Activity Report) (see § 6748). Upon completion forward all material to the SA. * * *.

* * * * *

(c) Referral of Cases by the State Agency

When the beneficiary does not respond to the State agency inquiry, or if his responses are inadequate or illegible, and in other instances where additional information is needed, the State agency may request assistance from the district office. These requests may include cases in which development on the Form SSA–401 (Medical History and Disability Report) was curtailed when the initial application was filed, and the State agency is unable to obtain the needed documentation, or when the completed questionnaire reveals that the beneficiary has worked and this factor needs additional documentation. * * *.

Part II

(4) In connection with my official duties I have custody of the claims folder of the plaintiff in this action. My examination of the folder reveals the following:

(a) With respect to an application filed on March 10, 1967 for a claim of disability filed under sections 216(i) and 223 of the Social Security Act, 42 U.S.C. 216(i) and 423, a hearing examiner of the Social Security Administration found plaintiff disabled under the provisions of Title II of the Social Security Act and an award notice of disability insurance benefits was sent to the plaintiff on June 21, 1968. With this notice plaintiff was advised that his claim would be reexamined in June 1969 because of possible medical improvement and also that if such review showed he was no longer disabled his benefits would be terminated.

(b) Following medical review of plaintiff's disability entitlement, a determination issued on February 18, 1970 that plaintiff's disability ceased as of January 1970 and benefits were accordingly, suspended. Plaintiff, by counsel, sought to avail himself of further administrative remedies by requesting reconsideration on April 11, 1970 and April 23, 1970. Plaintiff also filed in this court Civil Action No. 70–C–52–A on August 27, 1970 seeking an administrative hearing prior to suspension of benefits. An order of the court issued on June 26, 1970 for payments to be continued during the pendency of plaintiff's claim. Following a reconsideration determination a hearing was held on March 17, 1971 and the hearing examiner issued a decision on March 24, 1971 finding that plaintiff's disability had not ceased prior to that date. The hearing examiner's decision was effectuated on April 19, 1971 and the plaintiff was notified of such effectuation on April 30, 1971. By order dated May 6, 1971 this court dismissed Civil Action No. 70–C–52–A on grounds of mootness.

(c) Plaintiff's case was diaried for review the following year for possible medical improvement. On March 20, 1972 the Virginia State Agency sent a letter questionnaire form (SSA–454 (a)) to plaintiff containing the following:

> When your disability payments began, you were notified by the Social Security Administration that your condition might improve and your claim was scheduled for a future review. The Social Security Administration has requested us to help decide whether your condition still prevents you from working.
>
> To help us decide whether you are still entitled to disability benefits, please answer the questions on the next three pages, sign your name at the bottom, and return the form *within ten days* using the enclosed envelope which requires no postage.
>
> If you have questions or need help in filling out the questionnaire, please telephone or visit any social security office. You can find the address in the telephone directory under "Social Security Administration", or ask at your local post office. If you visit the social security office, please bring this letter with you.

The plaintiff completed the questionnaire portion of the form on March 29, 1972 and returned it to the State Agency indicating that he had not improved and listing thereon the medical sources where he had recently received treatment. A medical report was received from plaintiff's treating physician on April 24, 1972 and a psychiatric consultant submitted a report on May 12, 1972 of his examination of the plaintiff. On May 16, 1972 plaintiff was contacted and advised by the State Agency as follows:

> We previously informed you that we were asked by the Social Security Administration to help determine whether your impairment still prevents you from working. Although you indicate on the report you recently completed for us that you do not feel your condition has improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work, and have been since May, 1972.
>
> You were initially found to be disabled due to chronic anxiety and back strain. In addition you have been found to have diabetes. Medical evidence shows no significant motion limitation of your back which would

> impose severe functional restrictions. Diabetes is under control and no complications have been noted, secondary to this. Although you remain somewhat anxious, there is no indications of continued emotional problems of sufficient severity to preclude all work for which you are qualified.
>
> Therefore, disability benefits being paid on your social security number may be stopped unless additional evidence is submitted which shows that you are still unable to work because of your impairment.
>
> *If you have additional information you want us to consider, please let us know immediately, using the enclosed envelope; a reasonable additional amount of time will be granted where necessary for you to obtain and submit additional evidence.* If we do not hear from you within ten days, we will forward your records to the Social Security Administration and when a formal decision is made you will be notified.
>
> Under the Social Security Law, benefits may be paid for a three-month period of adjustment. This period includes the month in which you have a regained ability to work and two additional months. (Emphasis supplied.)

On May 25, 1972, plaintiff sent a letter to the State Agency advising that it already had enough evidence of his disabling impairments and to proceed with the decision. Plaintiff stated the following:

> In regards to your letter of May 16, 1972 asking for more evidence to prove my disability, I think you should already have enough evidence in my files to prove the disability already. Besides if I was able to work I would work because if I was able to work I could make more money than Social Security paid me. Another thing if you will check my reports a little closer I think you will find that I have arthritis of the spine rather than a strained back as you stated in your letter. The people at the Disability Section in Richmond have never made a yes decision in my case, I have always had to have a hearing in order to get the decision made properly. Even at the last hearing that was held in my case I had to employ an attorney, and the Examiner made his decision wholly in my favor and stated in his decision for

my checks to continue without interecption [sic]. So go ahead and make your own decision in the case, I know I'm not able to work, if I ever get able to work again I will, I will get by someway without the Social Security even though I paid into it while I was able to work.

On June 12, 1972, in accordance with section 223(a)(1)(D) of the Social Security Act, 42 U.S.C. 423(a)(1)(D), the Bureau of Disability Insurance of the Social Security Administration approved the determination of the State Agency finding plaintiff's disability ceased as of May 1972 and that benefits, accordingly, terminate after July 1972. The plaintiff was notified of this initial determination on July 7, 1972 and advised of his right to request reconsideration within 6 months of that date.

(5) On August 3, 1972, plaintiff instituted the present court action in which he asserts at paragraph VI of his complaint that through his attorney he had requested the medical evidence on which the determination was based but had not received such information. An investigation by the Bureau of Disability Insurance of pertinent offices of the Social Security Administration disclosed no record of a request by plaintiff or his attorney to review medical evidence in this case. The opportunity to review pertinent medical evidence in this case will be made available to plaintiff or his attorney representative upon a request therefor filed with the Social Security Administration. This may also be made during the course of administrative proceedings at the reconsideration stage upon plaintiff filing a request for such proceedings (Section 404.909 et seq. of Social Security Regulations No. 4, 20 C.F.R. 404.909 et seq.).

Bernard Popick,
BERNARD POPICK,
Director, Bureau of Disability Insurance.

In The United States District Court for The Western District of Virginia At Abingdon

Civil Action No. 72–C–167–A—Filed Feb. 9, 1973

Motion

George H. Eldridge, by Donald E. Earls, his attorney, moves the Court for an Order enjoining the Secretary of Health, Education & Welfare, his agents, servants, employees, and attorneys, from continuing to withhold social security benefits, until the determination of this action is completed.

This application is made on the grounds that the said George H. Eldridge will suffer immediate and irreparable harm and injury unless the Secretary of Health, Education & Welfare is so restrained, and that George H. Eldridge has no adequate remedy at law, all of which more clearly appears from the record in this case which is of record in the United States District Court for the Western District of Virginia at Abingdon, Virginia.

Dated this 8th day of February, 1973.

GEORGE H. ELDRIDGE,
By Counsel.

CLINE, MCAFEE, ADKINS & GILLENWATER,
Attorneys at Law,
Professional Arts Building,
Norton, Virginia,
By: ——— ———,
Counsel for Claimant.

In The United States District Court for The Western District of Virginia, At Abingdon

Civil Action No. 72–C–167–A—Filed Feb. 13, 1973

Order

This day came the Plaintiff, George H. Eldridge, by counsel, and moved the Court for an Order requiring that Social Security benefits be paid unto the said Plaintiff until such time as a final determination can be made in this case by this Court.

It appearing to the Court that by letter dated February 6, 1973, that the Government has requested additional time in which to file their briefs in this case and it appearing to the Court that irreparable harm will occur to the Plaintiff should the request of the Plaintiff not be granted, it is therefore Ordered that the said Social Security disability benefit payments be forthwith reinstated as of the date said benefits were terminated, and shall continue until the final determination by this Court of this cause on its merits.

It is further ORDERED that the said payments shall be made to the petitioner and that said petitioner shall not be held liable for the refund of any portion of same, should the eventual determination of this claim be adverse to him.

Enter this 13th day of February, 1973.

JAMES C. TURK,
U.S. District Judge.

In the United States District Court for the Western District of Virginia

Civil Action No. 72–C–167–A—Filed Mar. 20, 1973

Defendant's Supplemental Motion to Dismiss or, in the Alternative, for Summary Judgment

The defendant, Secretary of Health, Education and Welfare, by his undersigned attorneys, hereby supplements the Motion to Dismiss or, in the Alternative, for Summary Judgment, filed heretofore, by filing the attached Affidavit of Bernard Popick, Director of the Bureau of Disability Insurance, Social Security Administration, and the attached Supplemental Brief.

Respectfully submitted,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

LEIGH B. HANES, JR.,
United States Attorney,

HARLAND F. LEATHERS,
BIRG SERGEANT,
Assistant United States Attorney,

JEFFREY S. ROSEN,
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Attorney, Social Security Administration, Office of the General Counsel, Department of Health, Education and Welfare.

In the United States District Court for the Western District of Virginia

Civil No. 72–C–167A

Affidavit of Bernard Popick

BALTIMORE COUNTY
State of Maryland } *ss*:

I, Bernard Popick, being duly sworn, depose and say as follows:

(1) I am the Director of the Bureau of Disability Insurance of the Social Security Administration, the Bureau of the Administration responsible for administering the Disability Insurance Program. The following information is furnished to illustrate administrative factors pertinent to the subject civil action.

(2) The number of disabled beneficiaries and dependents receiving disability benefits under Title II of the Act in calendar year 1972 totalled 3,449,000.

(3) During calendar year 1972 there were 39,078 cases in which initial determinations of cessation of disability were rendered.

(4) During calendar year 1972 there were 2,801 hearings held in disability cessation cases.

(5) The average monthly benefit in disability benefit cases to a worker and his dependents in calendar year 1972 is $325.

(6) The average cost of conducting a hearing is estimated to be at least $400. It is estimated that the average cost would increase by at least 30 percent if hearings were held in all cases of cessation of disability, resulting from increased staff and available facilities.

(7) The cost per year of delaying termination of payments to disability beneficiaries and their dependents whose benefits are determined to have ceased is estimated to be:

a. Delay of one month: $325×39,078=$12,700,350
b. Delay of two months: $325×2×39,078=$25,400,700

(8) The present cost of conducting hearings in disability cessation cases is 2,801×$400=$1,120,400.

(9) The cost of conducting hearings in 39,078 cases of cessation of disability is estimated to be 39,078×$400×1.30=$20,320,560.

(10) The total estimated annual cost for holding hearings and delaying termination of disability benefit payments for two months in disability cessation cases is

$25,400,700
20,320,560
$45,721,260

(11) The above costs do not include the cost of a restructuring of the adjudicative process as presently exists, which would obtain if a hearing were held prior to an initial determination of cessation disability being rendered.

The initial determination of cessation of disability is rendered by a State Agency (Vocational Rehabilitation) under an agreement with the Social Security Administration (through delegations from the Secretary) in accordance with section 221 of the Social Security Act, 42 U.S.C. 421. State Agencies were so utilized by the Congress because they had well established relationships with the medical profession and would thereby remove the major case load from the Social Security Administration. H.R. Rep. 1698, 83 Cong. 2d Sess., pp. 23–24 (1954). Most States have one office of a State Agency therein [1] which has the medical personnel to provide medical expertise in the initial stages of the adjudicative process. In accordance with section 221 of the Act the Bureau of Disability Insurance in Baltimore, Maryland reviews the State Agency determination for uniformity of application of established standards. H.R. Rept. No. 2936, 84th Cong. 2d Sess., page 26 (1956).

The medical evidentiary development of a disability cessation case and adjudication at the initial and reconsideration determination stages is designed to make maximum use of existing medical expertise and facilities, and also to thus provide the evidentiary development in the case which an administrative law judge (formerly called hearing examiner) would not then have to undertake. It, too, centralizes the processes of such evidentiary development in the singular office of the State Agency and permits of greater uniformity of administration.

[1] Only a few States have multiple offices: Missouri and Florida agencies have five offices each; Louisiana has three; and California has two.

An increased number of hearings for all disability cessation cases which would be conducted on a more local level would require greater use of the Social Security District Office—in excess of 800—which do not now have personnel qualified to make medical judgments; the alternative would be to have the beneficiary travel to the State Agency.

(12) The additional administrative costs that would result by requiring a hearing prior to termination of benefits in a case of cessation of disability would be imposed upon the Disability Trust Fund created by Secton 201(b) of the Social Security Act, 42 U.S.C. 401(b), designed to finance payment of disability insurance benefits.

BERNARD POPICK,
Director, Bureau of Disability Insurance.

Subscribed and sworn to before me this 7th day of March 1973.

MARY A. BRENNAN,
Notary Public.

My Commission expires June 30, 1974.

Supreme Court of the United States

No. 74–204

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

Order Allowing Certiorari

Filed January 13, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

January 13, 1975

Mr. Justice Douglas took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1979

SUPREME COURT, U. S.
FILED
DEC 17 1974
MICHAEL RODAK, JR., CLERK

NO. 74-204

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

CASPAR W. WEINBERGER,

Secretary of Health,
Education & Welfare,

Petitioner,

vs.

GEORGE ELDRIDGE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

On April 6, 1973 the District Judge for the United States District Court for the Western District of Virginia decreed that George Eldridge must be afforded a hearing prior to termination of Social Security disability benefits. On April 1, 1974 the District Judge's opinion was summarily affirmed by the United States Court of Appeals for the Fourth Circuit. The Respondent points out that both the Fourth Circuit and the Fifth Circuit hold that due process forbids termination of disability benefits in the absence of oral evidentiary hearings (Williams v. Weinberger, 494 F.2d 1191 (C.A.5)).

The Eldridge case illustrates the need for an oral evidentiary hearing prior to termination of benefits as pointed out in the opinion and order of the District Judge. George Eldridge was twice denied disability benefits based upon the written application and medical reports, and on both occasions disability benefits were reinstated following an evidentiary hearing. A disability recipient who has once been declared disabled finds it difficult to comprehend the termination of benefits when their medical condition has not improved. Where due process is involved this Court has held that the State's concern in preventing an increase in its fiscal and administrative burden is outweighed by the interests of the welfare recipient's not receiving payments and the State's interests that the payments not be erroneously terminated. The District Judge responded to this overstatement by the Secretary.

The Secretary leaves the disability claimant at the mercy of the writing ability of his treating physician. Certainly, if evidentiary hearings are essential to establish entitlement to benefits an evidentiary hearing would be equally beneficial prior to their terminating benefits.

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CONCLUSION

For the reasons stated by the District Judge, which it is not felt need be reiterated in this brief, as well as the holdings in the Fourth and Fifth Circuit Courts, it is respectfully submitted that an oral evidentiary hearing is a vital procedural safeguard to disability recipients; and for these reasons the Petition for Certiorari filed by the Secretary should not be granted.

Respectfully submitted.

CLINE, McAFEE, ADKINS & GILLENWATER

CARL E. McAFEE

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Norton, Virginia 24273
Attorneys for Respondent

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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

CASPAR WEINBERGER, SECRETARY OF
HEALTH, EDUCATION AND WELFARE

vs.

GEORGE H. ELDRIDGE

No. 74-204

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 1, of the Rules of this Court, motion is hereby made that the respondent be allowed to proceed forma pauperis. Petitioner's affidavit is attached to this motion.

George H. Eldridge
-By Counsel-

CLINE, McAFEE, ADKINS & GILLENWATER
Attorneys at Law
Professional Arts Building
Norton, VA 24273

BY _____
COUNSEL FOR RESPONDENT

Dec. 3 1974 Motion Granted, Time for filing reponse to petition for writ of certiorari extended to and including Dec. 9, 1974
Clerk

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IN THE SUPREME COURT OF THE UNITED STATES

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE	)	
vs.	)	AFFIDAVIT
	)	No. 74-204
GEORGE H. ELDRIDGE	)	

I, George Eldridge, been duly sworn deposes and say:

This affidavit is being executed for use in support of a Motion for Leave to proceed in forma pauperis in the Supreme Court of the United States in a proceeding in which I am the respondent. This proceeding involves an action by me in the United States District Court for the Western District of Virginia for payment of Social Security Benefits. I was successful in the District Court and the Secretary of Health, Education, and Welfare appealed to the District Court's opinion to the Fourth Circuit Court of Appeals. The Circuit Court of Appeals affirmed the District Court and the Secretary of Health, Education and Welfare has now petitioned for a writ of certiorari of this Court. My attorney has been instructed to file a brief in response to the petition previously filed on the brief of the secretary.

Due to the very nature of my case I am unable to expend any mony to reimburse my attorney for any cost in preparing a response to the government petition. Because of my poverty I am unable to pay the fees and costs, or to give security thereof, and still be able to provide myself and my dependents with the necessities of life. I believe I should be allowed to proceed as a pauperis.

George H. Eldridge
GEORGE H. ELDRIDGE

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STATE OF VIRGINIA

COUNTY OF WISE, to-wit:

I, Paula F. Clark, a Notary Public within and for the county and state aforesaid, do hereby certify that George Eldridge, whose name is signed to the foregoing affidavit, bearing the date of the 25th day of November, 1974, has this day acknowledged the same before me in my county and state aforesaid.

Given under my hand this the 25th day of November, 1974.

My Commission expires August 12, 1977.

Paula F. Clark
NOTARY PUBLIC

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Supreme Court, U. S.
FILED
MAR 17 1975
MICHAEL RODAK, JR., CLERK

No. 74-204

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–204

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A–2A) is reported at 493 F. 2d 1230. The opinion and order of the district court (Pet. App. 3A–18A) are reported at 361 F. Supp. 520.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1974. The petition for a writ of certiorari was filed on August 29, 1974,[1] and was granted on

[1] On July 1, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 29, 1974.

January 13, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the administrative procedures governing the termination of Social Security disability benefit payments, under which, prior to termination, a beneficiary is given a summary of the evidentiary basis for the proposed termination and an opportunity to submit additional evidence and a written rebuttal, but not an oral hearing, are constitutional.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Sections 221 (a), (c) and (d), 223(a)(1), and Section 225 of the Social Security Act, as amended, 70 Stat. 815–818, 42 U.S.C. 421 (a), (c) and (d), 423(a)(1), and 425, provide in pertinent part:

> Section 421. (a) * * * In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall, except as provided in subsection (g) of this section, be made by a State agency pursuant to an agreement entered into under subsection (b) of this section. Except as provided in subsections (c) and (d) of this section, any

> such determination shall be the determination of the Secretary for purposes of this subchapter.
>
> * * * * *
>
> (c) * * * The Secretary may on his own motion review a determination, made by a State agency pursuant to an agreement under this section, that an individual is under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may determine that such individual is not under a disability (as so defined) or that such disability began on a day later than that determined by such agency, or that such disability ceased on a day earlier than that determined by such agency.
>
> (d) * * * Any individual dissatisfied with any determination under subsection (a), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.
>
> Section 423. (a) * * * (1) Every individual who—
>
> (A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),
>
> (B) has not attained the age of sixty-five,
>
> (C) has filed application for disability insurance benefits, and
>
> (D) is under a disability (as defined in subsection (d) of this section)
>
> shall be entitled to a disability benefit (i) for each month beginning with the first month after his

waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to such insurance benefits which terminated, or had a period of disability (as defined section 416(i) of this title) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or the third month following the month in which his disability ceases. * * *

* * * * *

Section 425. * * * If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits under section 423 of this title, or that a child who has attained the age of eighteen and is entitled to benefits under section 402(d) of this title, or that a widow or surviving divorced wife who has not attained age 60 and is entitled to benefits under section 402(e) of this title, or that a widower who has not attained age 62 and is entitled to benefits under section 402(f) of this title, may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such section 402(d), 402(e), 402(f) or 423 of this title until it is determined (as provided in section 421 of this title) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. In the case of any individual whose disability is subject to determination under an agreement with a State under section 421(b) of this title, the Secretary shall promptly notify the appropriate State of his action under this section and shall request a prompt determination of whether such individual's disability has ceased. * * *

The pertinent regulations of the Department of Health, Education and Welfare are contained in 20 C.F.R. 404.905, *et seq.*, and 20 C.F.R. 404.1501, *et seq.* Relevant portions of the Disability Insurance State Manual are reproduced as Appendix C to the petition (Pet. App. 19A–75A), and relevant portions of the Social Security Claims Manual are reproduced as Appendix B to this brief, *infra*, pp. 19A–61A.

STATEMENT

Under the disability insurance benefits program established by Section 223(a)(1) of the Social Security Act, as amended, 70 Stat. 815, 42 U.S.C. 423(a)(1), a worker is entitled to receive disability benefits only for the period during which he is disabled. Upon a determination that the disability has ceased, the Secretary must terminate the payment of benefits, effective the third month after the month of cessation of disability.

1. Respondent, a resident of Virginia, applied for disability benefits under the Social Security Act, which were awarded by the Secretary, acting through the Social Security Administration, effective in June 1968 (A. 11).[2] Respondent was informed that his claim would be reexamined due to the possibility

[2] Following an initial denial of his claim and affirmance after reconsideration, respondent was awarded benefits by decision of a hearing examiner (now administrative law judge) (A. 11).

of his medical recovery, and that his benefits would be terminated if the review demonstrated that he was no longer disabled (A. 11).[3]

The Virginia state agency scheduled respondent's case for review in 1972 and in March 1972 sent him a questionnaire (A. 12). The letter requested respondent to complete and return the questionnaire within ten days, and also informed him that if he required assistance or had any questions he could visit or telephone any Social Security office (A. 12).[4]

Respondent completed the questionnaire, stating that he had not improved and listing his treating physician (A. 12). The state agency obtained a medical report from the latter and also obtained the report of a psychiatric consultant based on his examination of respondent (A. 12).

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[3] Following a medical investigation and review of respondent's file, the Virginia state agency decided in February 1970 that his disability had ceased as of January 1970, and the Secretary suspended his benefits (A. 11) under since-abandoned procedures for the suspension of benefits prior to affording a claimant an opportunity to submit rebutting evidence. Compare *Richardson* v. *Wright*, 405 U.S. 208. In addition to pursuing his administrative remedies, respondent instituted litigation in the district court seeking to defer the suspension of benefits pending an administrative hearing (A. 11). On June 26, 1970, the district court ordered payments to be continued pending final resolution of the case on the merits (A. 11). The case was finally dismissed as moot on May 6, 1971, when the hearing examiner determined that respondent's disability had not ceased (A. 11).

[4] The state agencies responsible for administering this phase of the disability program typically operate through a single office in the state capital, but the more numerous local Social Security district offices can provide information and assistance to claimants and beneficiaries (see pp. App. A, *infra*, p. 15A, n. 33).

After considering the file, the state agency wrote respondent that, based upon the evidence, it had made a proposed determination that his disability had ceased in May 1972 (A. 12–13). The letter included a statement of reasons (*ibid.*).[5]

The state agency asked respondent to furnish within ten days any further evidence relating to the rea-

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[5] The letter stated (A. 12–13; emphasis supplied):

"We previously informed you that we were asked by the Social Security Administration to help determine whether your impairment still prevents you from working. Although you indicate on the report you recently completed for us that you do not feel your condition has improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work, and have been since May, 1972.

"You were initially found to be disabled due to chronic anxiety and back strain. In addition you have been found to have diabetes. Medical evidence shows no significant motion limitation of your back which would impose severe functional restrictions. Diabetes is under control and no complications have been noted, secondary to this. Although you remain somewhat anxious, there is no indications [sic] of continued emotional problems of sufficient severity to preclude all work for which you are qualified.

"Therefore, disability benefits being paid on your social security number may be stopped unless additional evidence is submitted which shows that you are still unable to work because of your impairment.

"*If you have additional information you want us to consider, please let us know immediately, using the enclosed envelope; a reasonable additional amount of time will be granted where necessary for you to obtain and submit additional evidence.* If we do not hear from you within ten days, we will forward your records to the Social Security Administration and when a formal decision is made you will be notified.

"Under the Social Security Law, benefits may be paid for a three-month period of adjustment. This period includes the month in which you have a regained ability to work and two additional months.

sons it gave or to request further time to obtain such evidence (A. 13). In response, he disputed one characterization of his claim made in the state agency's statement of reasons [6] and stated that the agency already had "enough evidence" in the file upon which to base a decision (A. 13).

Upon the basis of this information, the state agency determined that respondent had ceased to be disabled in May 1972 and forwarded that determination to the Social Security Administration, which accepted that conclusion and on June 12, 1972, determined that payments of benefits to respondent should cease, effective in July 1972 (A. 14), after the two-month statutory grace period (see p. 16, *infra*). Social Security notified respondent in writing of this determination and of his right to request reconsideration within six months (A. 14).

Respondent did not seek reconsideration. Rather, on August 3, 1972, he filed his complaint in this case seeking a declaration that the administrative procedures established by the Secretary for determining whether there was a continuing disability were unconstitutional, and an injunction requiring the Secretary to continue paying respondent benefits until he is afforded an oral evidentiary hearing concerning the cessation of his disability (A. 1–3). The Secretary moved to dismiss on the ground that respondent's benefits had been terminated pursuant to lawful regulations that do not violate due process (A. 3–4), and on February 13, 1973, the district court ordered respondent's benefits reinstated pending its final disposition on the merits (A. 15–16).

[6] Respondent claimed that he had arthritis of the spine rather than a strained back (A. 13).

On April 6, 1973, the district court held that the administrative procedures pursuant to which the Secretary terminated respondent's benefits were unconstitutional (Pet. App. 6A–18A). The court noted that since respondent did not contend that the Secretary had failed to comply with the applicable procedures the only issue was whether those procedures satisfy due process. The court ruled that respondent's interest in continued receipt of Social Security disability benefits is indistinguishable from the state welfare beneficiary's interest involved in *Goldberg* v. *Kelly*, 397 U.S. 254, and *Wheeler* v. *Montgomery*, 397 U.S. 280 (Pet. App. 8A–10A), and that, because disability determinations may involve subjective judgments in resolving conflicting medical evidence and are not exclusively based upon "objective" medical evidence, a due process standard different from that required by *Goldberg* v. *Kelly, supra*, for termination of welfare benefits is not justified for termination of Social Security disability benefits (Pet. App. 10A–13A).

The court rejected the Secretary's contentions that the protections against possibly erroneous decisions contained in the procedures complied with minimum standards of due process when viewed in the context of the administrative burden and immense costs that would result if the Secretary were required to provide an oral evidentiary hearing prior to the termination of benefits (*id.* at 12A–17A).

The court remanded the case to the Secretary for the payment of disability benefits and for further proceedings not inconsistent with the court's opinion (*id.* at 18A).[7]

The court of appeals affirmed on the opinion of the district court (*id.* at 2A).

SUMMARY OF ARGUMENT

1. Respondent's Social Security disability insurance benefit payments were terminated by the Secretary pursuant to procedures evolved to cope with the enormous burdens presented in administering a multi-billion dollar program in the context of a cooperative federal-state institutional structure. Those procedures are fair and satisfy due process requirements.

Before his benefits were terminated, respondent was given the opportunity to submit evidence demonstrating his continuing disability, and he did so. After the state agency involved in administering the disability program tentatively determined that he was no longer disabled, respondent was told the basis for that conclusion and was given a further opportunity to submit evidence. Though many take advantage

[7] The court's order continued the reinstatement of respondent's benefits. At current levels he is entitled to receive benefits of $163.60 per month. As a result of his disability, he is also entitled to receive both hospital and supplementary medical insurance under the Social Security Act, 42 U.S.C. 1395, *et seq.*, in which case a monthly premium of $6.30 would be deducted from his monthly benefits, so that his net monthly benefit would be $157.30. Respondent's children would also be entitled to receive, as his auxiliary beneficiaries, a monthly benefit totalling $151.00 as a result of his disability, pursuant to 42 U.S.C. 402(d)(1).

of that opportunity, with favorable results, respondent declined to do so, saying that the state agency already had "enough evidence."

After the state agency, with the concurrence of the Secretary, made its "initial determination" that respondent was no longer disabled, respondent did not seek reconsideration or request an evidentiary hearing, although many beneficiaries, taking advantage of the continuing right to submit additional evidence and to obtain *de novo* review, successfully seek both.

The courts below held that those procedures unconstitutionally deprived respondent of property without due process because prior to termination of disability insurance benefits respondent had no opportunity to appear personally or confront and cross-examine the witnesses who provided the evidence upon which the termination decision was based. The courts thus extended to the termination of Social Security disability payments the procedures that this Court in *Goldberg* v. *Kelly,* 397 U.S. 254, required for termination of welfare benefits. The two situations are sufficiently different, however, to justify different procedures.

2. This Court has held that, in determining what procedures for denying or terminating statutory benefits satisfy due process, the competing interests must be accommodated. Those interests are: the worker's interest in continued receipt of disability insurance benefits assessed in light of the reliability of the existing procedures, and the government's interest in avoiding unneeded administrative burdens and costs that would deplete the ability of the disability insur-

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ance trust fund to pay out the maximum proportion of its revenues as benefits to eligible workers.

A. Unlike the welfare recipients involved in *Goldberg* v. *Kelly*, the entitlement of disabled workers to Social Security benefits is unrelated to need. While many disabled workers may well rely heavily on them, such benefits are not, by definition, the last line of defense against poverty. Disabled workers may have income from a variety of public and private programs or other assets; other members of their families may be employed; and welfare and other programs may be available in case they are truly needy. Thus, disability benefits do not share the unique nature of welfare benefits that underlay the Court's decision in *Goldberg* v. *Kelly*.

B. The existing procedures provide a fair method for determining whether disability has ceased. Their reliability is not undermined by the lack of personal appearance and cross-examination before benefits are terminated. Only fifteen percent of all initial determinations that disability has ceased are ultimately reversed as a result of further administrative proceedings or on judicial review. In many of these cases, moreover, the different result reflects merely different judgments made in the subsequent *de novo* administrative review, or the submission of new evidence.

Disputed terminations of benefits typically involve, as here, a determination of medical recovery. Such determinations are based largely upon medical reports by the worker's own doctor and by other doctors. Such evidence is "uniformly recognized" to be reliable

(*Richardson* v. *Perales*, 402 U.S. 389, 405), and with evidence of that character, where veracity and memory are rarely in issue, cross-examination is of limited value. That the right to appear in person is not critical is indicated by the fact that on reconsideration, where there is no personal appearance, the decision is often favorable to the worker. In any event, even a high "reversal" rate does not imply that the existing procedures for making the initial determinations lack fundamental fairness.

C. The requirement of a pre-termination evidentiary hearing would entail enormous administrative burdens and expense, without compensating improvement of the reliability of the existing procedures. It is estimated that an additional 11,000 hearings annually would be required in disability termination cases. Under the Social Security Act, determinations of disability must be made by the state agency in cases of medical recovery. Those agencies, however, are centrally located, usually in a single office, are already overburdened with work on this and other programs, and are not staffed by personnel who are trained or necessarily qualified to conduct evidentiary hearings.

The Social Security Administration's Bureau of Hearings and Appeals would not be able effectively to handle this large additional number of hearings. That Bureau now conducts hearings under all Social Security programs, as well as under new related programs for the needy disabled and for miners with "black lung" disease. Despite expansion of the Bureau, it is falling further behind in coping with its

enormous and unavoidable existing caseload, so that there is currently at least a ten-month delay between hearing requests and decisions. Conducting an additional 11,000 hearings would mean either that many claimants under other programs would face further delays in receiving benefits to which they may be entitled, or that many workers no longer entitled to disability benefits would unjustifiably continue to receive benefits while awaiting a hearing.

The costs of such a pre-termination hearing requirement, moreover, would be substantial—as much as $25,000,000 annually. Such an expense could impair the already-precarious actuarial soundness of the disability insurance trust fund, perhaps thereby depriving eligible workers of benefits to which they might otherwise be entitled.

ARGUMENT

The Current Procedures for Termination of Social Security Disability Insurance Benefits Provide Due Process to Beneficiaries

I. INTRODUCTION: THE PROCEDURES CURRENTLY FOLLOWED IN TERMINATING SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

A recent comprehensive study of the federal disability insurance program concluded that the Social Security disability program, which this Court has termed "a comprehensive complex administrative program" (*Richardson* v. *Wright*, 405 U.S. 208, 209), "has always been the most complex of the Federal cash benefit programs to administer." Staff of the House Committee on Ways and Means, 93d Cong., 2d Sess., *Report on the Disability Insurance Program* 7 ("*Staff Report*"). We begin, therefore, by describing the pertinent features of that program as established by Congress and implemented by the Secretary.

A. THE NATURE OF THE BENEFITS AND THE DISABLED WORKER'S ENTITLEMENT TO THEM

In 1950 Congress established a program of federal assistance, supported by general revenues, to states that provided public assistance to needy persons who were, *inter alia*, permanently and totally disabled. 64 Stat. 555.[8] In order to provide benefits for disabled workers who were not necessarily needy (see H. Rep. No. 1189, 84th Cong., 1st Sess., p. 4),[9] Congress established, in the 1956 amendments to Title II of the Social Security Act, a new program of disability insurance for workers. 70 Stat. 815.[10]

Financed by revenues from employers' and employees' payroll taxes paid into a separate disability insurance trust fund (26 U.S.C. 3101(a), 3111(a); 42 U.S.C.

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[8] This program has recently been replaced with the Supplemental Security Income program, discussed below (see pp. 22–24, *infra*), involving direct federal aid to the needy disabled, among others. 42 U.S.C. (Supp. III) 1381, *et seq.*

[9] The program was described in the legislative history as a first line of defense, public assistance being the second (102 Cong. Rec. 13038 (remarks of Senator George)), in order that disabled workers not be required "to become destitute before they receive earned benefits." 102 Cong. Rec. 13022 (remarks of Senator Jackson).

[10] The Amendments also established a program of benefits for disabled widows and widowers (42 U.S.C. 402(e)(1)(B)) and disabled children (42 U.S.C. 402(d)(1)(B)) of deceased workers. These benefits are administered through essentially the same procedures as those governing the disability program for disabled workers, and we do not discuss them separately.

401(b)), the program provides monthly benefits for a disabled person who has worked sufficiently to have an insured status (42 U.S.C. 423(c)(1)) and who has had substantial work experience in a specified period preceding the onset of disability.[11] If a worker qualifies for disability benefits, the program also provides benefits to the worker's dependents under specified circumstances, particularly involving the age of the auxiliary beneficiary. 42 U.S.C. 402 (b), (c), (d).[12] In addition, at age 65 a disabled worker's benefits are automatically converted to retirement benefits (42 U.S.C. 416(i)(2)(D), 423(a)(1)), payable regardless of whether the worker thereafter remains disabled. Prior to age 65, however, the worker is entitled to disability benefits only so long as his or her disability continues, and, ordinarily, for the two months following the month in which the disability ceased. 42 U.S.C. (Supp. III) 423(a).

Thus, to establish initial and continued entitlement to benefits, the Act requires the worker to prove "disability" within the meaning of the Act by furnishing "such medical and other evidence of the existence

[11] A disabled worker older than 30 (as most are) must have at least 20 quarters of covered employment in the 40 quarters preceding the disability; less stringent requirements apply to younger workers. 42 U.S.C. 423(c)(1).

[12] Children of a disabled worker are ordinarily entitled to benefits until they reach age 18, or age 22 if they pursue higher education. 42 U.S.C. 402(d)(1). A worker's spouse is also entitled to benefits under certain conditions. 42 U.S.C. 402(b), (c). For convenience, however, we shall use "worker" and "beneficiary" to refer to all categories of beneficiaries, and unless otherwise indicated.

thereof as the Secretary may require." 42 U.S.C. 423 (d)(5). In carrying this burden, the worker must demonstrate that he or she is unable

> to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *. [42 U.S.C. 423(d)(1)(A).]

In satisfying this test, the worker must demonstrate, by means of "medically acceptable clinical and laboratory diagnostic techniques" (42 U.S.C. 423(d)(3)), that he or she has a physical or mental impairment, as defined in the Act (42 U.S.C. 423(d)(3)), that is of such severity that

> he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. [42 U.S.C. 423(d)(2)(A).][13]

Unlike some disability programs (see *Staff Report* 6), the Social Security disability insurance program does not recognize degrees of disability; at any given time a worker either is or is not "disabled," and the amount of the benefits is not related to the nature or

[13] There is a different definition of disability for eligible widows and widowers. See 42 U.S.C. 423(d)(2)(B). The Secretary's regulations concerning disability are set forth at 20 C.F.R. 404.1501–404.1539.

extent of the disability.[14] Entitlement to benefits is also unrelated to the worker's need or to the amount of the worker's income or support from most other sources, such as employment of other members of the family, the worker's own limited or occasional employment,[15] savings, investments, or tort claim awards, or the "many other important programs both public and private, which contain provisions for disability payments affecting a substantial portion of the work force * * *" (*Richardson* v. *Belcher,* 404 U.S. 78, 85–87 (Douglas, J., dissenting)), *e.g.,* workmen's compensation awards,[16] private insurance, public or private pensions, veterans benefits, food stamps, or public assistance. See *Staff Report* 9–10, 419–429; cf. Dixon, *Social Security Disability and Mass Justice: A Problem in Welfare Adjudication* 90–91 (1973). Even if otherwise qualified, moreover, a disabled worker is ordinarily not entitled to receive benefits until having been

[14] The level of benefits is determined by the worker's average monthly wage, age, and other factors specified in 42 U.S.C. (Supp. III) 415. See 42 U.S.C. (Supp. III) 423(a)(2).

[15] In 1970, about ten percent of disabled workers receiving disability benefits reported earnings from employment. *Staff Report* 390–395. Of course, in a period other than a trial work period (see p. 25, *infra*), earnings exceeding a level established by the Secretary (see 20 C.F.R. 404.1534) could lead to a determination that the worker was engaged in "substantial gainful activity" and hence no longer entitled to benefits (see p. 25, *infra*).

[16] Workmen's compensation benefits, however, are deducted in part in accordance with a statutory formula. 42 U.S.C. (Supp. III), 424a; 20 C.F.R. 404.408; see *Richardson* v. *Belcher*, 404 U.S. 78.

disabled for five months. 42 U.S.C. (Supp. III) 423(c).

Because the program is not limited to the permanently disabled. Congress has from the outset stressed rehabilitation as a purpose. Thus, it is the declared policy of Congress that disabled workers seeking benefits be referred to state vocational rehabilitation agencies (42 U.S.C. 422(a)), and a worker's refusal to accept rehabilitation services may be a ground for reducing or withholding benefits. 42 U.S.C. (Supp. III) 422(b); see 20 C.F.R. 404.422.

In sum, the benefits are conditional in nature, and a beneficiary is entitled to them only so long as the conditions of entitlement are satisfied.

B. THE INSTITUTIONAL SETTING OF THE TERMINATION PROCESS

The Social Security disability insurance program is administered through an unusual combination of federal and state agencies performing interrelated functions specified by the Act and the regulations. As we have noted, Congress intended that the disability program be coordinated with state vocational rehabilitation programs, to provide disabled workers a means of adjusting their employment prospects to their impaired abilities (see pp. 18–19, *supra*). In an effort to implement this purpose, Congress required that state vocational rehabilitation agencies be given the opportunity to play a significant role in the administration of the Social Security disability program.

The Act provides that the determinations whether a person is under a disability, when it began, and

when it ceased shall be made by the state agency administering a plan approved under the Vocational Rehabilitation Act, 41 Stat. 735, as amended, 29 U.S.C. (Supp. III 701, *et seq.*, or by another appropriate agency, pursuant to an agreement entered into with the Secretary.[17] That determination is "the determination of the Secretary for purposes of this [program] * * *." 42 U.S.C. 421(a).[18]

The standards to be applied and the procedures followed by a state agency are prescribed by the Secretary through the uniform state agency agreements (see 42 U.S.C. 421(b)),[19] supplemented by a Disability Insurance State Manual ("DISM") (see, *e.g.*, Pet. App. 19A–75A), and the state agency's costs of administration are paid out of the federal trust fund.

[17] The use of state agencies to make determinations of disability for federal purposes was initiated in the Social Security Amendments of 1954, 68 Stat. 1080, as amended, 42 U.S.C. 416(*i*), which established a "freeze" on a disabled worker's insured status and benefit amount for purposes of the basic old age and survivors insurance program. See *Staff Report* 110–112. This use of state agencies was intended to "serve the dual purpose of encouraging rehabilitation contacts by disabled persons and would offer the advantages of the medical and vocational case development undertaken routinely by the rehabilitation agencies. These agencies have well-established relationships with the medical profession and would remove the major load of case development from the Department." H. Rept. No. 1698, 83d Cong., 2d Sess., pp. 23–24.

[18] The Act authorizes the Secretary to make the determination concerning disability if a state declines to enter into such an agreement (42 U.S.C. 421(g)), but, while not required to, all states have done so. *Staff Report* 148.

[19] A model agreement is set forth at *Staff Report* 178–187.

42 U.S.C. 421(e).[20] In most cases the state's vocational rehabilitation agency acts as the "state agency" for purposes of the Social Security disability insurance program (*Staff Report* 148), typically operating through a centralized office serving the entire state (A. 18).[21]

The Act authorizes the Secretary to review on his own motion a state agency's determination that a person is disabled (but not a determination that the person is not disabled) and permits the Secretary to determine that the person is not disabled, or that the disability began later or ceased sooner than determined by the state agency. 42 U.S.C. 421(c). Thus, at this stage the Secretary may only make a determination concerning a worker's disability that is less, but not more, favorable to the worker than that made by the state agency. Congress provided this one-sided revision authority with the expectation that the Secretary would use it "in order to assure uniform administration of the disability benefits and to protect the Federal Disability Insurance Trust Fund from unwarranted costs." H. Rept. No. 2936, 84th Cong., 2d Sess., p. 26.

The Secretary has delegated his responsibilities and powers under the Act to the Social Security Ad-

[20] The federal government also bears the state agency's costs of rehabilitating certain disabled workers. 42 U.S.C. (Supp. III) 422(d).

[21] The state agency in Virginia, the Disability Determination Section of the Department of Vocational Rehabilitation, has two offices for this purpose, in Richmond and Norfolk.

ministration ("SSA"). See 40 Fed. Reg. 4473, amending 33 Fed. Reg. 5828. The disability insurance benefits program is handled principally by SSA's Bureau of Disability Insurance, headquartered in Baltimore,[22] hearings and appeals are handled by SSA's Bureau of Hearings and Appeals. Cf. 20 C.F.R. 422.201, *et seq.*[23] In addition, as we discuss below in more detail (see App. A, *infra,* pp. 14A–16A), local SSA district offices also play a role in administering the disability insurance program. SSA employees implement the Act pursuant to a Claims Manual ("CM") (*e.g.,* App. B, *infra,* pp. 19A–61A).

In considering the institutional setting, two programs similar to the Social Security disability insurance program should be mentioned briefly, although the procedures followed in those programs differ from those followed under the disability program in issue here. In 1972 Congress enacted the Supplemental Security Income ("SSI") program for the needy aged, blind or disabled, 86 Stat. 1465, 42 U.S.C. (Supp. III) 1381, *et seq.,* which replaced the program of federally-aided state assistance to the needy disabled established in 1950 (see p. 15, *supra*) with title XVI of the Social Security Act. The new program provides direct federal aid to needy persons who are aged, blind or "disabled," defined in the same manner

[22] The Bureau has approximately 6,000 employees at headquarters (*Staff Report* 134), who are also responsible for other programs.

[23] At the end of fiscal 1974, 482 administrative law judges were authorized to serve in SSA's 118 hearing offices throughout the country (*Staff Report* 140), but they are responsible for hearings under a variety of other programs.

as in the Title II Social Security disability insurance program. See 42 U.S.C. (Supp. III) 1382c(a)(3).

In addition, a "grandfather" clause in the SSI program automatically extended such benefits to persons who were already receiving benefits under existing state programs for the needy aged, blind or disabled (which all states, including Virginia,[24] had adopted) so long as they continue to meet the state standards, even if such persons would not be regarded as disabled under federal standards. 42 U.S.C. (Supp. III) 1382c (a)(3)(E). According to SSA, about 3 million people became entitled to SSI benefits under the grandfather clause, in addition to about 1.25 million under the federal SSI standards.

A person may receive disability benefits under both Title II (involved here) and SSI, and as of November 1974 about 480,000 of the 1.5 million receiving SSI benefits as being disabled were also receiving Social Security disability benefits, although the amount of SSI benefits would be reduced in such cases in accordance with the statute, 42 U.S.C. (Supp. III) 1382a (a)(2)(B). However, if Social Security disability benefits were terminated and SSI benefits were not,[25] the amount of the latter would be increased.

The SSI program, which went into effect in January 1974, is also administered through the combined efforts of SSA and the state agencies, in that determinations of "disability" for that program are made by

[24] See Va. Code 63.1–104, repealed by Va. Code 63.1–25.1 (1974 Supp.).

[25] This could occur if a worker were no longer disabled by federal standards but was still disabled by the state standards applicable under the grandfather clause.

the same state agencies as are used under 42 U.S.C. 421. See 42 U.S.C. (Supp. III) 1383b(a). This program has already placed a heavy workload on the state agencies,[26] and that workload is being felt, and will increasingly be felt, by SSA's Bureau of Disability Insurance. See generally *Staff Report* 55–59, 122–124, 135–137, 396–411.

In addition, in legislation enacted in 1969 and 1972, Congress established a program of disability benefits for miners suffering from pneumoconiosis ("black lung" disease), which suddenly imposed an enormous caseload on the Bureau of Disability Insurance [27] under a program that is presently scheduled to last until at least 1981, 83 Stat. 792, as amended, 30 U.S.C. (Supp. III) 901, *et seq.* See generally *Staff Report* 8–9, 119–121, 412–416.[28]

Both of these new programs are also beginning to place great strains on the personnel and resources of SSA's Bureau of Hearings and Appeals, which also handles Social Security disability cases. *Staff Report* 8–9, 58.

[26] We are informed by SSA that between July 1, 1974, and January 22, 1975, 689,000 disability-related claims under the SSI program were submitted to the state agencies, of which 219,000 were still pending at the end of January 1975.

[27] The state agencies involved in making determinations under the Social Security disability insurance program are not ordinarily involved in making determinations under the black lung program.

[28] SSA's responsibility is generally limited to claims filed before July 1973, the Department of Labor having been given responsibility for most claims filed thereafter. 30 U.S.C. (Supp. III) 925, 931, *et seq.* By the end of 1973, however, more than 500,000 black lung claims had been filed with SSA (*Staff Report* 415) and, according to SSA, 30,000 are now at the hearing stage.

C. GROUNDS FOR TERMINATION OF BENEFITS

Determinations of disability require that the statutory criteria see pp. 16–17, *supra*) be applied to inherently dynamic factual conditions: mental and physical impairments may improve (or worsen); the worker may be rehabilitated through training and therapy; and the existence of jobs the worker can perform may be affected by economic or technological developments. Cf. *Staff Report* 15. Accordingly, eligibility for disability insurance benefits is not permanent and is dependent upon the continued existence of the facts on which the entitlement is based.

The Act, moreover, provides that disability benefits may not be paid for any month in which a worker engages in "substantial gainful activity" as defined by the Secretary. 42 U.S.C. 423(d)(4); see 20 C.F.R. 404.1532–404.1534. In order to encourage disabled workers to return to work, however, the Act also provides for a nine-month "trial work period," beginning with the month in which a worker became entitled to benefits; employment during that period is not to be considered in determining whether a worker's disability ceased during that period, 42 U.S.C. 422(c); see 20 C.F.R. 404.1536; CM § 6703; DISM § 352.1–352.6.[29]

[29] If a worker's period of disability began within five years after the termination of a prior period of disability, he would have been entitled to his insurance benefits without serving the waiting period (now five months) between the onset of disability and entitlement to monthly benefits. 42 U.S.C. (Supp. III) 423(a). In such cases, the trial work period provision does not apply. CM § 6703.2(c); DISM § 352.3.

Benefit payments to a small proportion of all beneficiaries are terminated each year. Thus, while at the end of 1973 there were 2,016,626 disabled workers receiving monthly disability insurance benefits totalling $4.7 billion annually (*Staff Report* 313), and 1,542,356 auxiliary beneficiaries receiving $1.04 billion ($280 million for disabled workers' spouses, $760 million for their children) (*id.* at 307, 314), during 1973 SSA terminated the benefits of 37,926 workers (and, consequently, their 50,000 or so auxiliary beneficiaries [30]) (*Staff Report* 347), as well as of an additional small number of disabled spouses and children. *Id.* at 310–311.

The principal causes of such terminations are that the worker is no longer disabled or has returned to work (Pet. App. 22A; cf. App. A, *infra,* p. 2A, n. 3).[31] *Staff Report* 347. For auxiliary beneficiaries, changes in relationship, dependency status or age and completion of schooling are also causes of termination (cf. p. 54, *infra,* n. 66).[32] Because this case involves medical

[30] This is an estimate provided by SSA on the assumption that workers whose benefits are terminated have the same average number of auxiliary beneficiaries as do all workers receiving benefits.

[31] In a small number of cases, estimated by SSA to be about two percent of total disability terminations, benefits are terminated because a worker about whom there is an unresolved issue of continuance of disability has persistently refused to cooperate by providing the necessary evidence or cannot be located (see App. A, *infra,* p. 4A, n. 8). CM §§ 6736.4, 6736.5; DISM § 356.

[32] The procedures followed in such cases, which typically do not involve any controversies, differ from those followed in medical recovery cases and are not involved here.

recovery, we shall focus on ~~them~~ the procedures in such cases.[33]

D. THE PROCEDURES FOLLOWED IN TERMINATING BENEFITS BECAUSE OF MEDICAL RECOVERY

In Appendix A to this brief (*infra,* pp. 1A–17A), we set forth in detail the procedures followed, both before and after termination, in terminating Social Security disability insurance benefits because of medical recovery (and return to work). We also include there a variety of statistical data concerning the implementation of those procedures. Here we merely summarize that material.

Determinations that a worker's disability has ceased because of medical recovery—the most common type of disputed determination—typically occur, as in this case, as a result of a medical examination previously scheduled in view of the possibility that the worker would recover (App. A, *infra,* p. 2A). In making such a "continuing disability investigation," the state agency periodically requests the worker to submit information concerning his present condition, medical treatment and medical restrictions, ability to return to work, employment during the past year, receipt of vocational rehabilitation services, and anything else relevant to his continuing entitlement to benefits. Unless the response provides clear-cut evidence of medi-

[33] Since the vast majority of terminations involve disabled workers, rather than disabled spouses or children (*Staff Report* 310–311) (36,900 compared with 2,200 in fiscal 1972), we shall also, for convenience, refer only to disabled workers, although the same procedures are followed in the other cases.

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cal recovery, the state agency will obtain information from the worker's sources of treatment and may also obtain a consultative examination of the worker by an independent physician (*id.* at 4A–5A).

A state agency "team" including a physician and a trained disability examiner reviews the evidence. If they believe that the worker is no longer disabled, he is informed of that tentative conclusion, is given a summary of the evidence upon which it is based and is provided at least ten days to respond, with additional time being provided if needed. At this, as at all stages of the disability claim process, the worker may be assisted by counsel or by some other representative, who is entitled to examine all evidence in the worker's file, including the medical reports.[34] Unlike respondent (see p. 8, *supra*), many workers make such further submission, which frequently result in a change of the state agency's tentative determination. Although the worker does not normally appear in person before the state agency, such appearances may be made and procedures exist for incorporating in the worker's file information and observations derived from such interviews (App. A, *infra,* pp. 5A–7A).

The state agency forwards its determination whether the worker is still disabled to SSA's Bureau of Disability Insurance, which reviews it for conformity with uniform national standards. As we have noted (see p. 21, *supra*), SSA may (but only infrequently does) itself determine that disability has

[34] The disabled person's direct access to the medical reports is limited, under current regulations, in accordance with accepted medical practice (see App. A, *infra*, p. 6A, n. 13).

ceased but may not make a determination more favorable to the worker than that made by the state agency (see App. A, *infra,* p. 8A). In cases where it would be inclined if permitted, to make a more favorable determination, SSA may and sometimes does return the case to the state agency for further consideration, which often results in a revised determination favorable to the worker (*id.* at 8A, n. 18).

When SSA determines (or accepts the state agency's determination) that disability has ceased, it so notifies the worker in writing, stating the basis of its "initial determination" and outlining the worker's right to seek further review. Upon such a determination, the worker receives benefits for two months following the month in which disability ceased (see p. 16, *supra*). In about half the cases the two-month grace period has already expired when the initial determination is made, so that benefits terminate immediately (App. A, *infra,* p. 9A; App. C, *infra,* p. 64A).[35]

[35] The Act authorizes the Secretary to "suspend" the payment of benefits pending inquiry by the state agency as to cessation of disability. 42 U.S.C. 425. Unlike the suspension procedures involved in *Richardson* v. *Wright*, *supra*, the current procedures provide for "suspension" of benefits in a limited category of cases, but only after the worker has had a pre-termination hearing. See CM §§ 6706, 6707; DISM §§ 265.1D 265.2. This authority may be used if, because of the date of cessation of disability, overpayments are already being made or are imminent. In practice, however, benefits are seldom suspended, and it occurs primarily in cases where the worker has returned to work, rather than in cases of medical recovery. In some cases, moreover, payment of benefits are suspended at the request of the beneficiary (see CM § 6736.7), who may wish to avoid responsibility for receipt of overpayments while his entitlement to benefits is in doubt. Respondent's benefits were not suspended, and the suspension procedures are not directly in issue here.

Following an adverse initial determination, a worker may request "reconsideration," in which event a different team at the state agency will review the record *de novo,* considering any additional evidence submitted by the worker or obtained by the state agency itself (*e.g.,* an additional medical examination). The state agency's decision on reconsideration is reviewed by SSA as in the case of initial determinations. Decisions on reconsideration are typically made within two to four months of a request for reconsideration (App. A, *infra,* pp. 9A–11A).

If the decision on reconsideration is adverse, the worker may obtain an evidentiary hearing before an SSA administrative law judge, at which the worker may (but need not) appear personally, present new evidence and subpoena witnesses. These hearings are non-adversary in character: SSA is not represented by counsel or other staff, and the judge's determination is based on the evidence in the worker's file, which the judge considers *de novo,* and such other evidence as the worker submits or the judge himself secures (*e.g.,* an additional medical examination). Because of the enormous workload imposed under the various programs administered by SSA, which has substantially enlarged the backlog of hearing requests (see pp. 22–24, *supra*), it now takes between ten and eleven months between a request for hearing and a decision (App. A, *infra,* pp 11A–12A).

If such a post-termination evidentiary hearing results in an adverse decision, the worker may request discretionary review by SSA's Appeal Council, which

may review the record *de novo* and may receive additional evidence (*id* at 12A–13A). After an adverse decision or denial of review by the Appeals Council, the worker may obtain judicial review. The district court, unlike all prior levels of review, is required to treat findings as conclusive if they are supported by substantial evidence (*id* at 13A–14A).

The great bulk of investigations of possible cessation of disability conducted pursuant to the pre-termination hearing procedure in issue here, result in initial determinations that the worker's disability has continued: about 120,000 out of about 155,000 initial determinations in fiscal 1973—more than 75 percent (*id.* at 2A, n. 3). Moreover, only a relatively small proportion of determinations that disability has ceased are "reversed" on post-termination review.

Thus, of about 35,000 adverse initial determinations in fiscal 1973, in only about 9,000 (25 percent) was reconsideration sought; in about 40 percent of reconsiderations in initial disability cases the decision is favorable to the worker (*id.* at 10A, 11A, n. 21).[36] Of the 5,600 adverse decisions after reconsideration in disability cessation cases, in only 1,900 (34 percent) was a hearing requested; after hearing in initial disability cases in about 40–50 percent—in many of which the worker did not appear personally—the decision is favorable to the worker (*id.* at 11A, 12A, n. 24). The Appeals Council ruled in the workers favor in about twelve percent of all disability cases it reviewed in fiscal 1973 (*id.* at 13A).

[36] Data for initial disability cases is thought by SSA to be reasonably representative in this regard of the pattern in termination cases.

Although the data for all stages of the review process are not precisely comparable, these figures indicate that only in about fifteen percent of the initial determinations of cessation of disability does post-termination review result in a decision favorable to the worker. Most of these "reversals," moreover, occur at the reconsideration stage, which is conducted under essentially the same procedures as the typical pre-termination inquiry, *i.e.*, on a paper record without personal appearance of the worker and without confrontation or cross-examination of witnesses.

E. RETROACTIVE ADJUSTMENTS OF UNDERPAYMENTS AND OVERPAYMENTS

If, at any point after the payment of benefits has been terminated, it is determined (whether on reconsideration, after a hearing, or on judicial review) that the worker's disability continued beyond the date of cessation established in the initial determination, then the worker is entitled to retroactive payment of benefits in accordance with the subsequent determination. Cf. 42 U.S.C. 423(b).

On the other hand, if a beneficiary receives any benefits to which he is later determined not to be entitled, the Act authorizes the Secretary to reduce any other payments to which the beneficiary is entitled, or to require the beneficiary to refund the overpayment (42 U.S.C. 404(a)(1)), unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or "would be against equity and good conscience." 42 U.S.C. 404(b). See generally 20 C.F.R. 404.501–404.515. In many cases a beneficiary

who is eventually found to be no longer disabled would be "without fault" for any receipt of benefits in the interim or otherwise not liable for overpayments. In addition, since many such beneficiaries have limited financial resources, there is limited practical likelihood that overpayments can be recovered, particularly since there is frequently no opportunity to withhold portions of other payments and the amounts may not justify litigation.

II

THE PROCEDURES FOR TERMINATION OF SOCIAL SECURITY DISABILITY BENEFITS SATISFY DUE PROCESS REQUIREMENTS

The issue in this case is the constitutionality of the procedures by which Social Security disability benefits are terminated when, because of changes in the medical condition of the beneficiary, his disability has ceased. The lower courts held that the procedures are unconstitutional because they do not provide an evidentiary hearing before, rather than after, the benefits are terminated. The courts thus extended to the termination of Social Security disability insurance payments the procedures that this Court held in *Goldberg* v. *Kelly*, 397 U.S. 254, are constitutionally required for the termination of state welfare benefits.

We submit that the procedures used in terminating Social Security disability payments satisfy due process. The Social Security disability program is sufficiently different from the state welfare program involved in *Goldberg* v. *Kelly* to permit different pro-

cedures under the two programs. The procedures for terminating Social Security disability benefits provide an adequate and fair opportunity for a beneficiary to submit all relevant information necessary to enable the Social Security Administration to make an informed and reliable judgment whether the disability has ceased. Indeed, respondent apparently acknowledged this when, prior to the initial decision by the state agency that he was no longer disabled, he declined to submit additional material on the ground that the state agency already had "enough evidence" to make a decision (see p. 8, *supra*).[37]

The adequacy of the procedures for terminating disability benefits cannot be determined in a vacuum, but must take account of the complexity and magnitude of the Social Security disability program, the vast number of termination proceedings now conducted, and the effect upon the program if an evidentiary hearing were required in every case before benefits could be terminated. "The [Social Security] system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But * * * '[s]uch a system must be fair—*and it must work.*'" *Richardson* v. *Perales, supra,* 402 U.S. at 389

[37] The correctness of SSA's initial determination that respondent is no longer disabled is not before the Court. That determination is not subject to judicial review except in accordance with 42 U.S.C. 405(g), and respondent has not taken the necessary steps to obtain such review (*i.e.*, seeking reconsideration, a post-termination hearing, and Appeals Council review (see App. A, *infra*, pp. 9A–13A).

(emphasis supplied). The procedures by which disability payments are now terminated are fair and they work.

The starting point for determining the constitutionality of these procedures is the settled proposition "that the interpretation and application of the Due Process Clause are intensely practical matters and that 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961)." *Goss* v. *Lopez,* No. 73–898, decided January 22, 1975, slip op. at 12. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471, 481.

Accordingly, a resolution of a procedural due process claim requires a discriminating analysis of the relevant interests at stake. Compare, *e.g., North Ga. Finishing, Inc.* v. *Di-Chem, Inc.,* No. 73–1121, decided January 22, 1975, with *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600. While "*some* kind of notice and * * * *some* kind of hearing" constitute the fundamental requisites of due process (*Goss* v. *Lopez, supra,* slip op. at 13) (emphasis in original), "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers* v. *McElroy, supra,* [367 U.S.] at 895; *Morrissey* v. *Brewer, supra* [408 U.S.] at 481." *Ibid.*

The Court has identified three general interests that must be assessed in determining the constitutional

sufficiency of procedures for denying or terminating constitutionally-protected interests. They are: first, the nature of the property (or liberty) interest of which a person is assertedly being deprived (cf., *e.g., Wolff* v. *McDonnell,* No. 73–679, decided June 26, 1974, slip op. 19);[38] second, the risk of an erroneous deprivation of such interest through the procedures used (*e.g., Goss* v. *Lopez, supra,* slip op. at 14–16); and third, the administrative burdens and costs that particular procedural requirements would entail. *Id.* at 17.

The procedures the Secretary follows in terminating Social Security benefits—under which the beneficiary is fully informed of the reasons for the proposed termination and given the opportunity to submit any material he wishes relating to the continued existence of the disability, but an evidentiary hearing is held only after the initial termination of benefits has been made—appropriately accommodate the interests involved in the operation of the Social Security disability program, and therefore satisfy due process.

[38] In rejecting contentions that particular laws or administrative actions denied either substantive or procedural due process, the Court has assumed that the statutory entitlements to disability insurance benefits and other Social Security benefits constitute "property" under the due process clause of the Fifth Amendment. *E.g., Flemming* v. *Nestor,* 363 U.S. 603, 611; *Richardson* v. *Perales, supra,* 402 U.S. at 401; *Richardson* v. *Belcher, supra,* 404 U.S. at 80–81. We do not here contend that respondent's asserted entitlement to continued receipt of disability insurance benefits is not a "property" interest protected against arbitrary deprivation by the due process clause. Rather, we contend that the existing procedures provide all the process that is constitutionally due before respondent can be initially deprived of that interest.

A. THE NATURE OF THE WORKER'S INTEREST IN SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

The disability benefits involved in this case are significantly different from the welfare benefits involved in *Goldberg* v. *Kelly, supra,* upon which the courts below relied. That case involved welfare benefits payable to "needy families with children" (42 U.S.C. 601, *et seq.*), or to "any person unable to support himself or to secure support from other sources." 397 U.S. at 256, n. 1. The Court observed that the " 'one overpowering fact' " was that, " '[b]y hypothesis, a welfare recipient is destitute, without funds or assets,' " and faces " 'brutal need.' " *Id.* at 261. The Court concluded that (*id.* at 264; emphasis in original, footnote omitted):

> the crucial factor in this context—a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

In sum, it was because " '[t]he stakes are simply too high for the welfare recipient' " (*id.* at 266) that the Court concluded that an evidentiary pre-termination hearing was required.

By contrast, Social Security disability benefits are not based upon need (see pp. 15–19, *supra*).[39] While many recipients of such benefits may rely heavily upon them, they are not "by hypothesis" (*Goldberg* v. *Kelly*) "the last source of support available, aside from charity * * *." *Arnett* v. *Kennedy,* 416 U.S. 134, 191 (White, J., concurring in part). Like recipients of other governmental payments subject to termination, a disability beneficiary "may well have independent resources to overcome any temporary hardship, and he may be able to secure a job * * *. Alternatively, he will be eligible for welfare benefits." *Arnett* v. *Kennedy, supra,* 416 U.S. at 169 (Powell, J., concurring in part). In addition to the "basic floor of need" provided by the welfare system (*id.* at 202 (White, J., concurring in part)), the worker may be entitled to benefits under other public and private programs (see pp. 17–18, *supra*), and other family members may have jobs or other income.

In short, the beneficiary "is not totally without prospect for some form of support during the period between the pretermination and final hearing on appeal, though it may not be equivalent" (*id.* at 201–202 (White, J., concurring in part)) in amount or continuity to his prior disability benefits. Indeed, while the record in this case does not show whether

[39] Under the SSI program (see pp. 22–24, *supra*), in which need is a factor, the statute provides for an oral evidentiary hearing (held by SSA) concerning a determination about eligibility (42 U.S.C. (Supp. III) 1383(c)), and SSA terminates SSI benefits only after such a hearing, if requested, 20 C.F.R. 416.1336(c), 40 Fed. Reg. 1512; see *Staff Report* 346.

respondent has other income or assets, he professed to be able to "get by" without Social Security benefits (A. 14).[40] He did not seek reconsideration of SSA's determination that he was no longer disabled although, had he done so, that procedure held out the greatest likelihood for a prompt correction of any error in the determination (see p. 31, *supra*).[41]

B. THE RISK OF AN UNRELIABLE DECISION RESULTING FROM THE EXISTING PRE-TERMINATION HEARING PROCEDURE

The rules of procedure required by due process "may be shaped by consideration of the risks of error" (*Wolff* v. *McDonnell, supra,* slip op. at 26), in part because "[t]he greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision * * *." *Arnett* v.

[40] The record does not indicate whether respondent has sought or received other benefits, such as public assistance or state aid to the needy disabled, nor does it reveal whether he was eligible for or sought SSI benefits for the needy disabled (see pp. 22–24, *supra*).

[41] Because "the possible length of wrongful deprivation of * * * benefits is an important factor in assessing the impact of official action on the private interests * * * the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." *Fusari* v. *Steinberg*, No. 73–848, decided January 14, 1975, slip op. at 10–11. While no precise data are available as to disability terminations, the data as to all other disability determinations indicate that, if respondent had promptly sought reconsideration, he would have had his claim considered anew, along with any new evidence he chose to submit, by different people. The vast majority of "reversals" occur at the reconsideration stage, where decisions are typically made within a few months of the request for reconsideration (see p. 31, *supra*).

Kennedy, supra, 416 U.S. at 201 (White, J., concurring in part). That risk depends in part upon "the nature of the issues at stake" (*Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at 609), whether they "lend themselves to documentary proof" (*ibid.*), and the nature and extent of consideration they receive at the pre-termination stage (*id.* at 616–617).

By definition, disability terminations involve persons who have already been found to be "disabled" within the meaning of the Act on the basis of specific facts. Termination of disability benefits will ordinarily result only when there has been some distinct change of circumstances. As we have noted (see p. 26, *supra*), medical recovery is the usual change underlying disputed terminations.[42]

This Court has observed that, unlike the welfare eligibility proceedings involved in *Goldberg* v. *Kelly, supra,* where the decision turns on a medical judgment about the worker's condition and capabilities, "the specter of questionable credibility and veracity is not present," even though there may be "professional disagreement with the medical conclusions * * *." *Richardson* v. *Perales, supra,* 402 U.S. at 407.[43]

Medical recovery terminations, like the initial determinations of disability, rely heavily upon "routine,

[42] This case involves termination because of medical recovery, and does not present any question concerning the relatively rare terminations where a beneficiary would not cooperate or could not be located (see p. 26, *supra*, n. 31).

[43] In return-to-work cases, the determinations are frequently based upon employers' wage reports and other routine filings made subject to penalties for false statements. 26 U.S.C. 6674, 7204; 42 U.S.C. 408; see 18 U.S.C. 1001.

standard, and unbiased medical reports by physician specialists concerning a subject whom they" have examined (*id.* at 404), the general reliability and probative value of which reports have been "uniformly recognized." *Id.* at 405.[44] In addition, "[t]he vast workings of the social security administrative system make for reliability and impartiality in the consultant reports" (*id.* at 403), reflecting the fact "that the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." *Ibid.*

More specifically, as in respondent's case, the worker is given several meaningful and effective opportunities before termination of benefits to demonstrate that he still is disabled. The efficacy of these procedures is shown by the fact that approximately 80 percent of the continuing disability examinations result in determinations that the worker is still disabled (see p. 31, *supra*).

If the state agency has tentatively decided that disability has ceased, it gives the worker a summary of the basis for that conclusion, tailored to his case and prepared so as to be understandable (App. A, *infra,* pp. 6A–7A), and an ample opportunity to respond and submit additional evidence (*ibid*). Such further submissions are frequently made and often result in a determination favorable to the worker (see *id.* at 7A, n. 14). Probably more often than in welfare

[44] We do not contend "that the 'credibility and veracity' of doctors and employers can never be in issue in a disability case" (*Richardson* v. *Wright, supra,* 405 U.S. at 219 (Brennan, J., dissenting)), for procedural rules are designed for the generality of cases, not the rare exceptions.

cases, workers in disability termination cases are assisted by counsel or some other representative at this and all other stages (see *id.* at 6A, n. 12). The determination whether disability has terminated is made by a team of dispassionate, trained professionals applying detailed guidelines and standards, not by caseworkers who may have had adverse personal confrontations with the beneficiary. Before adopting a state agency's adverse decision, SSA reviews it to insure conformity with uniform national standards (see *id.* at 8A).

These pre-termination procedures are suitably "tailored to the capacities and circumstances of those who are to be heard." *Goldberg* v. *Kelly, supra,* 397 U.S. at 268–269. Unlike welfare recipients, disabled workers usually have substantial recent employment experience (see p. 16, *supra*),[45] and also have sufficient educational experience so that "[w]ritten submissions are [not] an unrealistic option for most recipients * * *." *Goldberg* v. *Kelly, supra,* 397 U.S. at 269.[46]

[45] A study based on data for 1965 found that only 53 percent of the severely disabled persons receiving public assistance on account of their disabilities were employed at the onset of those disabilities, whereas 91 percent of disabled worker beneficiaries under the Social Security Act had been so employed. Brehm, *The Disabled on Public Assistance*, in Department of Health, Education and Welfare, *Social Security Survey of the Disabled: 1966, Rep. No. 9*, at 5 (1970).

[46] In 1971, 86 percent of workers under 30 who were awarded benefits, 62 percent of those between 45 and 49, and 48 percent of those 60 or over had attended school to at least the ninth grade. Fifteen percent of the beneficiaries under 30 had attended college for at least one year. *Staff Report* 320.

The substantial reliability of the existing procedures for making initial determinations that disability has ceased is suggested by the fact that as to only a small number—probably about fifteen percent—is it held at later stages of review that the worker is still disabled (see p. 31, *supra*).[47]

Moreover, those cases cannot all be regarded as "reversals" in the usual sense. Cf. Dixon, *supra,* at 33, 41. The fact that a decision favorable to the worker is made after an initial determination that the worker is no longer disabled does not necessarily mean that the earlier decision was "erroneous." The program is operated on an open-file basis, and a worker may continuously update his file by submitting new evidence (see pp. 30–31, *supra*).[48] Moreover, borderline cases frequently turn not on factual disputes but on questions of judgment about the effect of physical limitation or discomfort on a worker's ability to perform suitable tasks. Indeed, as with initial disability claim

[47] For example, in fiscal 1973, there were 575,300 initial determinations adverse to workers' initial disability claims, but claims were allowed as to only 61,900 on reconsideration, only 24,100 after evidentiary hearings, only 1,918 after review by the Appeals Council (318 after remand from the courts), and only 172 by the courts. *Staff Report* 308–311. Thus, a total of 88,090 claims were allowed after post-termination review, which constituted fifteen percent of claims initially denied that year.

[48] The fact that more time has elapsed between the initial determination and the post-hearing decision than the initial determination and the decision on reconsideration (see App. A, *infra*, p. 11A, n. 22, p. 12A, n. 23) tends to inflat the post-hearing "reversal" rates to some degree. See Dixon, *supra*, at 41.

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proceedings, the "reversal" rate "attests to the fairness of the system and refutes the implication of impropriety." *Richardson* v. *Perales, supra,* 402 U.S. at 410.

The lower courts in this case held the existing pre-termination procedures constitutionally deficient because, despite their evident reliability, they do not include the opportunity for the beneficiary to be heard in person and to confront and cross-examine witnesses providing the evidence upon which the termination of benefits is based (Pet. App. 6A, 10A–11A), elements required in the welfare context by *Goldberg* v. *Kelly, supra.* There is nothing to indicate, however, that those procedural rights would improve to any significant extent the already substantial reliability of the existing procedures.

Given the nature of the issues and the evidence relied upon, the right to confront and cross-examine witnesses (frequently physicians), even if practicable, is not likely to aid the worker appreciably because of the inherent reliability of the physicians' reports (see pp. 40–41, *supra*).[49] Indeed, respondent has not suggested any respect in which this right would have assisted him.

[49] In requiring that the Secretary give a recipient of Social Security disability benefits a pre-termination evidentiary hearing "in the nature of that required for welfare beneficiaries" by *Goldberg* v. *Kelly, supra* (Pet. App. 17A–18A), the courts below did not clearly indicate whether they were holding that the doctors who provide medical reports must be produced for cross-examination at such a hearing. While *Goldberg* v. *Kelly* required that welfare beneficiaries "be given an opportunity to confront and cross-examine the witnesses relied on by the department" (397 U.S. at 270), the Court indicated in *Perales* that the doctors themselves need not routinely be produced, even in a full-scale post-termination evidentiary hearing. 402 U.S. at 406–407. As the Court observed in *Perales*, a requirement of live medical testimony at a substantial number of hearings (regardless of who holds the hearings) would not only place "a substantial drain on the trust fund," because of the larger consultant fees that would be required, but, perhaps more importantly, would also impose "a substantial drain * * * on the energy of physicians already in short supply." *Id.* at 406.

With respect to a personal appearance by the worker—which is possible under present procedures (see p. 28, *supra*), but which respondent did not request—the minor significance of this element is shown by the large number of cases in which initial adverse decisions are reversed in reconsideration proceedings, in which the worker ordinarily does not appear personally (see p. 31, *supra;* App. A, *infra,* p. 12A, n. 24).[50] This conclusion is further supported by the fact that relatively few beneficiaries whose terminations are upheld on reconsideration request an evidentiary hearing (see p. 31, *supra*).

C. THE SUBSTANTIAL ADMINISTRATIVE BURDEN AND COSTS OF REQUIRING EVIDENTIARY HEARINGS PRIOR TO TERMINATION OF SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

In deciding procedural due process issues, the Court has repeatedly emphasized that the rules of procedure must "be shaped by the consequences which will follow their adoption." *Wolff* v. *McDonnell, supra,* slip

[50] While the rate of favorable decisions appears to be somewhat greater for all who seek hearings (see p. 31, *supra*), it is not known to what extent that is attributable to submission of new evidence, worsening of the worker's condition due to passage of time, personal appearance of the worker, or other reasons.

op. at 26. For example, confrontation and cross-examination are not required if the proceedings would "be longer and tend to unmanageability." *Id.* at 25. See, also, *Gerstein* v. *Pugh,* No. 73–477, decided February 18, 1975, slip op. at 18, n. 23.

In terminating disability payments, "a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted" terminations of benefits. *Arnett* v. *Kennedy, supra,* 416 U.S. at 168 (Powell, J., concurring in part). "To impose in each * * * case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in * * * [program] effectiveness." *Goss* v. *Lopez, supra,* slip op. at 17. Speaking with particular reference to the 20,000 disability claim hearings then held annually, the Court referred in *Richardson* v. *Perales, supra,* 402 U.S. at 406, to the "sheer magnitude" of the administrative burden that would result if reliance on a paper record were impermissible.[51]

[51] Indeed, in *Goldberg* v. *Kelly, supra,* the Court took note of the fact that "[s]ummary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible * * * [and] conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held." 397 U.S. at 265. The Court also noted that the requirement of a prior public hearing involves greater expense to the extent that benefits paid to ineligible recipients pending the hearing and decision cannot be recouped because the recipients are judgment proof. *Id.* at 266. While these governmental interests were "not overriding in the welfare context" (*ibid.*), because of the unique importance of welfare benefits to the recipients (see p. 37, *supra*), the Court did not suggest that they should not be given greater effect in other contexts.

The administrative burdens and costs apprehended by the Court in *Perales* would be even more severe if the full pre-termination hearing requirements of *Goldberg* v. *Kelly* were imposed upon the Social Security disability insurance program. Operating through an already complex administrative structure, that program has been growing rapidly,[52] and is expected to expand at an accelerated rate, particularly if unemployment remains substantial. *Staff Report* 15. In mid-1974, state agencies were making more than 60,000 disability determinations a week (in both Social Security and SSI cases). *Id.* at 3.

In coping with this burgeoning caseload, SSA has continually attempted "to evolve procedures to meet needs as they arise." *Richardson* v. *Wright, supra,* 405 U.S. at 209. The pre-termination hearing requirements imposed here, however, could not be handled by adjusting existing procedures, but would instead require a fundamental restructuring of the existing institutions. It would impose heavy administrative and financial strains upon already-overburdened agencies.

As we have noted, the Act requires that determinations of cessation of disability because of medical recovery must initially be made by the state agencies (see pp. 19–21, *supra*). Those agencies, however, are presently not equipped to hold evidentiary hearings. Their staffs consist of doctors, disability examiners

[52] The number of disabled workers and dependents receiving benefits increased from 750,000 in 1960 to about 3.5 million in 1973. *Staff Report* 3.

and vocational counselors, who already have an expanding heavy caseload.[53] They do not have people who can properly serve as hearing examiners. Those agencies typically operate out of a central office, so that expensive and time-consuming travel would be required either by the worker or by the state agency staff. A hearing structure would have to be constructed from the ground up in each state, an inevitably time-consuming and costly process.

SSA has recently undertaken a test project to determine the feasibility and cost of providing a limited form of personal hearing on reconsideration at the state agency level. At present, however, SSA does not know how workable or expensive such a procedure would be. But, as the Court observed in *Perales,* the system not only must be fair, "it must work." 402 U.S. at 399.

The alternative procedure of having SSA itself hold a pre-termination evidentiary hearing is scarcely more practical. (There is a substantial question whether that would be permissible under the Act[54]). SSA district offices, although numerous and conveniently located,

[53] In fiscal 1973, all state agencies employed a total of approximately 4,700 employees handling disability cases and made more than 900,000 initial determinations in such cases. *Staff Report* 162.

[54] As we have noted (see pp. 19–21, *supra*), in medical recovery cases the determination whether a worker's disability has continued or ceased must be made by the state agency, and SSA is not permitted on review of such a state agency determination, to make a determination in the worker's favor. 42 U.S.C. 421(a)(c). Only after a post-termination hearing pursuant to 42 U.S.C. 405(b) may SSA decide in favor of the worker. See 42 U.S.C. 421(d). If there were a right to a pre-termination hearing held by SSA, and SSA's decision after such a hearing were

do not have on their staffs persons with the training and experience necessary to make judgments about medical recoveries or vocational issues.

SSA's limited number of administrative law judges and hearing examiners are already overburdened with their existing and unavoidable caseload under the Social Security, SSI and black lung programs (see pp. 22–24, *supra*),[55] and significant delays already exist between requests for hearings and decisions in those cases (see App. A, *infra,* pp. 11A, n. 22, 12A n. 23). Despite the growth of SSA's Bureau of Hearings and Appeals,[56] as of December 1974 it had a backlog of

to be dispositive, the state agency's adverse determination would not necessarily be given effect as "the determination of the Secretary" as 42 U.S.C. 421(a) requires. Additional problems would be presented if the state agency were required to accept the determination made by SSA after the latter held a hearing. Cf. *Morgan* v. *United States*, 298 U.S. 468, 481. ("The one who decides must hear.")

[55] As the number of disability beneficiaries has increased, there has been a corresponding surge in the use of the administrative decision-making process:

	Fiscal year—				
	1970	1971	1972	1973	1974*
Total decisions	904,600	1,118,100	1,231,700	1,249,500	1,423,600
Initial	765,800	952,900	1,016,100	1,024,500	1,162,600
Reconsideration	97,700	116,800	159,500	156,800	188,400
Hearings	31,300	37,100	43,900	53,100	55,600
Appeals council	8,800	10,000	11,000	13,500	15,700
Court decisions	1,000	1,300	1,200	1,600	1,300
Court actions filed**	1,339	1,561	1,820	2,268	2,534

Source: *Staff Report* 308
* 1974 figures compiled by SSA subsequent to *Staff Report*
** Calendar year figures, compiled by SSA.

[56] The Bureau has grown from having a budget of $21.8 million and 1,278 employees in 1970 to a budget of $43 million and 2,044 employees in 1974. *Staff Report* 31.

102,129 hearing requests,[57] the vast majority involving disability issues. SSA anticipates that even under existing programs and procedures this backlog will increase to about 130,000 at the end of fiscal 1975. SSA's efforts to increase its existing staff of hearing officers [58] have thus far been hampered by the difficulty in obtaining rapidly a sufficient number of qualified candidates satisfying Civil Service requirements. But even an enlarged corps of hearing officers all operating at maximum efficiency [59] would be hard-pressed to reduce the existing backlog, now estimated by SSA to

Requests for Hearing Pending as of December 8, 1974

[57] Retirement and survivors insurance benefits	1,701
Disability insurance benefits	45,048
Black lung benefits	33,888
Supplemental security income (mostly disability)	18,035
Disabled widow's/widower's insurance benefits	2,262
Health insurance benefits	1,195
Total	102,129

[58] Hearing Personnel on Duty as of January 1975:

	ALJ's[a]	BL ALJ's[b]	SSI HE's[c]	Total
As of Nov. 15, 1974	410	110	92	612
Projected as of July 1, 1975	[d]395	125	170	690

[a] Administrative Law Judges—GS 15 $29,818—$36,000.

[b] Temporary Black Lung Administrative Law Judges (authorized to handle only Black Lung cases)—GS-14 $25,581—$33,258.

[c] SSI Hearing Examiners (authorized to handle only SSI cases)—GS-13 $21,816—$28,359.

[d] While SSA expects to appoint 15 additional ALJ's, it anticipates attrition of 30, for a net loss of 15.

[59] According to SSA, experienced hearing officers (after nine months on duty) dispose of 190 cases annually. When the present 612 hearing officers have all been on duty nine months, SSA will have the capability to dispose of 9,690 hearings per month. But some of the hearing officers are still in training, and others are just beginning to conduct hearings.

involve a delay of between ten and eleven months from hearing request to decision.[60]

The impact of a requirement of a pre-termination evidentiary hearing in all cases cannot be assessed precisely because one can only speculate about the number of beneficiaries who would seek such a hearing and the attendant delays and costs. The number would be substantial—25 percent of those who receive adverse initial determinations, or about 11,000 in fiscal 1976 (see App. C, *infra*, p. 63A) seems a reasonable estimate.[61] Moreover, some beneficiaries who now accept an adverse initial determination would be likely to request a pre-termination hearing if the effect would be to prolong the payment of benefits.[62]

[60] Complete elimination of such delay would be infeasible. In fiscal 1973, in 31.1 percent of the state agencies cases at the reconsideration stage and 42.7 percent of the cases at the hearing stage, a consultative medical examination was held. *Staff Report* 238. These examinations must be arranged at the convenience of both the physician and the worker. In addition, delay in disposition after a request for a hearing inevitably results from the normal constituents of an adjudicatory proceeding—*e.g.*, the need to schedule the hearing at the beneficiary's convenience, to secure the attendance of witnesses (if any), to file briefs, and to render a decision.

[61] A reasonable guideline is the fact that in recent years about 25 percent of workers sought reconsideration of initial determinations that they are no longer entitled to benefits (see p. 31, *supra*).

[62] An assumption that the number of beneficiaries who would request a pre-termination evidentiary hearing might exceed the number who would request post-termination review, perhaps encouraged in their persistence because of the prolonged payment of benefits resulting from a hearing request, is supported by the experience of the states with welfare terminations following the decision in *Goldberg* v. *Kelly*, *supra*, in March

Requiring SSA to provide such a substantial number (at least 11,000) of additional [63] hearings would have severe adverse consequences upon the functioning of the Social Security system. Depending on which cases were heard first, for a considerable period either the pre-termination disability cases would face

1970. As shown in the following table, the ratio between discontinuances of public assistance payments and disposition of hearing requests concerning such discontinuances altered significantly in the period following the decision, indicating a likelihood that hearings were being increasingly requested.

Period	A Number of public assistance cases where money payments were discontinued	B Number of hearing requests disposed of where the issue was the discontinuance of assistance	C Percentage of hearings (col. B / col. A x 100)
July to December 1970	403,070	5,000	1.2
January to June 1971	551,339	6,500	1.2
July toDecember 1971	772,588	9,354	1.2
January to June 1972	807,822	15,866	2.0
July to December 1972	953,807	19,442	2.0

Department of Health, Education and Welfare, *Fair Hearings in Public Assistance*, Publication Nos. 72-03257 (1972), 72-03253 (1972), 73-03253 (1973), 73-03257 (1973), 74-03257 (1973), Department of Health, Education, and Welfare, *Reasons for Discontinuing Money Payments to Public Assistance Cases, NCSS Rep. A-11*, Publication Nos. 72-03108, 72-03109 (quarterly).

If the rate differentials here are representative, they suggest that pre-termination evidentiary hearings would be requested at 1.67 times the rate of requests for post-termination review (*i.e.*, 1.67 is the amount by which the base rate of 1.2 hearing requests per 100 discontinuances must be multiplied to obtain the rate of 2.0). Thus, 11,000 post-termination reconsiderations would convert to 18,370 pre-termination hearings.

[63] In *Golberg* v. *Kelly*, the Court anticipated that, in addition to the pre-termination hearing there required, the existing right to an even more substantial post-termination hearing would continue. 397 U.S. at 266–267. It is not entirely clear, moreover, that a pre-termination hearing satisfying *Goldberg* v. *Kelly* would meet the constitutional standards for the hearing required before a person may be finally deprived of property.

substantial delays or other cases handled by the Bureau of Hearings and Appeals would face additional [64] delays. Insofar as the burden of delay was borne by the Social Security disability termination cases, many workers no longer eligible would receive trust fund payments that might never be recouped. On the other hand, other eligible claimants would be temporarily deprived of benefits for a more prolonged period [65] if the termination cases were heard first. Neither result is readily acceptable.

A pre-termination hearing requirement in Social Security disability insurance cases would entail substantial costs. Appendix C to this brief contains data estimating that the cost would be at least $15 million to $25 million annually at the current level of benefits, salaries and other costs. Such added costs would constitute a substantial drain on the trust fund and would represent funds that cannot be used to pay benefits to eligible disabled workers.

The disability trust fund—sustained by receipts from a special payroll tax—is already facing an actuarial deficiency, a situation likely to be worsened by prolonged unemployment, which results in increased claims for benefits and decreased revenues. *Staff Report* 4, 13–16, 332–344, 348–350. In view of the ever-

[64] As we have noted (see p. 51, *supra*), the current delay is about ten months between hearing request and decision.

[65] The majority of the cases heard by the Bureau under SSA's various programs involve initial claims for benefits, rather than terminations. This Court has never suggested that such claimants are entitled to receive benefits pending an appeal from an initial determination that they are ineligible. Cf. *Richardson* v. *Perales*, *supra*, 402 U.S. at 407.

escalating demands of other social programs, it cannot be lightly assumed that Congress will provide sufficient supplemental financial support for the disability program so that the beneficiaries will not bear directly any added costs of overpayments and administration.

If evidentiary hearings are required prior to termination of disability insurance payments, that requirement might also be extended to other Social Security programs, under which SSA terminates the benefits of more than 1,500,000 persons annually.[66] Requiring hearings in all those cases would increase the administrative and financial burdens upon SSA even more seriously.[67]

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[66] SSA estimates for fiscal 1976 the following volume of terminations or reductions of benefits under Title II of the Social Security Act alone for reasons other than death or attainment of age 65:

Termination event	*Estimated annual volume*
Attainment of age 18 or 22 of a child or student	500,000
Current year work report	400,000
Marriage, remarriage, or divorce of auxiliary beneficiary or survivor	200,000
Termination of benefits to a young wife or young widow due to attainment of age 18 of last entitled child on same earnings record	200,000
Cessation of full-time school attendance	150,000
Entitlement of Additional Beneficiary	40,000
No entitled child in care of young wife or widow	20,000
Total	1,510,000

[67] In *Richardson* v. *Wright*, *supra*, Mr. Justice Brennan estimated that, based on the smaller base of Title II terminations in 1969, there would be about 100,000 terminations under other Title II programs as to which a pre-termination evidentiary hearing might be required. 405 U.S. at 226.

* * * * *

A comprehensive congressional study of the Social Security disability programs recently concluded that "[t]here is a substantial question as to whether the multitiered Social Security appeals procedure can withstand the *current* workloads under Social Security and SSI, even if the present Black Lung situation is only a temporary aberration." *Staff Report* 5 (emphasis supplied). The study expressed concern "that any further enlargement of Social Security responsibilities may be 'the straw that breaks the camel's back.'" *Id.* at 9. Even if that gloomy assessment turns out to be somewhat overstated, it suggests the dangers in substantially augmenting the heavy existing administrative burdens of SSA.

Imposing on the termination of social security disability payments the procedures established by *Goldberg* v. *Kelly* for terminating state welfare benefits "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson* v. *Perales*, *supra*, 402 U.S. at 410. The procedures now followed in terminating social security disability benefits are fair, and they work. They are the product of a continuing evolution of procedures "to meet needs as they arise." *Richardson* v. *Wright*, *supra*, 405 U.S. at 209. They should not be found constitutionally deficient on the basis of unfounded hypotheses that an untested system of oral evidentiary hearings prior to termination of benefits would be so markedly fairer and more

reliable as to justify the enormous attendant administrative burdens and costs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1975.

APPENDIX A

THE PROCEDURES FOLLOWED IN TERMINATING SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

Because a worker's "disability" and entitlement to benefits may and frequently do change, a disabled worker's file is always "open" for new evidence and the Secretary has adopted procedures calling for "continuing disability investigations" to reexamine periodically a prior finding of disability.[1] When a worker is awarded benefits because of a disability, SSA informs the worker about the conditional nature of the determination and the continuing review of disability.[2]

[1] See 20 C.F.R. 404.1521, *et seq.* The continuing disability investigation procedures are contained in SSA's Claims Manual ("CM"), §§ T6260, *et seq.*, and §§ T6700, *et seq.* (see App. B, *infra*), and the Disability Insurance State Manual ("DISM"), §§ 350, *et seq.* (see Pet. App. 19A–75A).

[2] Thus, SSA's notification of entitlement to benefits is accompanied by a booklet (*Your Social Security Rights and Responsibilities: Disability Benefits*) (March 1974)) which states (p. 7) that

"[y]our eligibility ends if your condition improves so that you are capable of doing substantial gainful work. Your eligibility also ends if you return to substantal gainful work."

In cases where an improvement appears possible, the text of the letter notifying the claimant of an award provides in part (Award or Disallowance Notices, 8280.353):

"The evidence in your claim shows that your condition may soon improve. Therefore, we plan to get in touch with you about ———— to see if you are still eligible to receive disability benefits. To help us determine this, we may ask you to give us more information or to take a medical examination. If we find you are still disabled, your benefits will continue. But, if

In 1973, 160,627 such continuing disability investigations were made, resulting in 37,926 determinations that disability had ceased. *Staff Report* 347.[3] The principal reasons for making such investigations in particular cases are that a medical reexamination had previously been scheduled (as here),[4] an employer has

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our review shows you are no longer disabled, your benefits will be stopped.

If you return to work before we contact you or you have already returned to work when you receive this notice, you should notify us immediately. Then we can review your claim in time to prevent any incorrect payments." (Emphasis in original.)

A similar notification is sent to beneficiaries who are hospitalized at the time of the award.

[3] The detailed statistics are as follows (*Staff Report* 347):

TABLE 88.—*Continuing disability determinations, year 1973*

Why investigation was made	All cases [1]	Percent of total	Cessations	Percent of total	Continuances	Percent of total
Total	160,627	100.0	37,926	100.0	122,701	100.0
Medical re-exam diary	65,143	40.7	11,949	31.6	53,194	43.3
Trial work diary matured	9,172	5.7	7,300	19.2	1,872	1.5
Earnings posted-medical re-exam set	1,043	.6	399	1.1	644	.5
Earnings posted-medical re-exam not set	26,346	16.4	4,062	10.7	22,284	18.2
Voluntary report of return to work—medical recovery expected	7,690	4.8	4,512	11.9	3,178	2.6
Voluntary report of return to work—medical recovery not expected	20,561	2.8	4,856	12.8	15,705	12.8
Voluntary report of improvement or hospital discharge	4,869	3.0	551	1.5	4,318	3.5
Voluntary report of work stoppage	7,243	4.5	56	.1	7,187	5.9
Request for reconsideration, reopening, or higher appeal	5,367	3.3	3,380	8.9	1,987	1.6
Individual made his own payee, and other reason	10,873	6.8	624	1.6	10,249	8.4
Rehabilitation notice	2,320	1.4	237	.6	2,083	1.7

[1] Cessations and continuances.

[4] CM § 6705; DISM § 351. Future medical reexaminations are scheduled in those cases in which current medical evidence indicates that the beneficiary's disability may later cease. CM § 6705(f); DISM § 351.

reported earnings by the worker,[5] or the worker has "voluntarily" reported that his condition has improved or that he has returned to work.[6]

As we have noted, the Act requires that determinations about whether a worker is still disabled must be made in the first instance by the state agency (see pp. 19–21, *supra*). As a result, different procedures are followed at the initial stages in cases of possible medical recovery than in cases involving return to work or other causes of termination of benefits.

1. CONTINUING DISABILITY INVESTIGATIONS CONCERNING MEDICAL RECOVERY

(*a*) *Procedures prior to termination of benefits*

In cases involving possible medical recovery, as here, the investigation is made by the appropriate state agency. CM § 6705.1; DISM § 353.2.[7] The disability determination is made by a team composed of

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[5] Employers are required by the Internal Revenue Code (26 U.S.C. 3101, *et seq.*) and regulations (26 C.F.R. 601.401(b)(3)) to report quarterly to the Internal Revenue Service wages paid to all employees. The Service forwards these wage reports to SSA, whose Bureau of Data Processing posts each wage earner's quarterly earnings to his Social Security account.

[6] The regulations require a disability beneficiary to notify SSA promptly if his condition improves, if he is discharged from a hospital, if he engages in any work activity, or if his earnings from work increase. 20 C.F.R. 404.1531; cf. 42 U.S.C. 408(d) and 423(d)(5).

[7] In the small number of cases (see p. 2A, *supra*, n. 3), in which a worker was scheduled for medical reexamination and SSA receives evidence of work activity, it will have the return-to-work issues developed initially by the SSA district office, pursuant to the procedures described below (see pp. 14A–17A, *infra*), before the case is forwarded to the state agency for any necessary further proceedings concerning medical recovery. DISM § 353.2.

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a physician and a non-medical person trained in disability evaluation, using a consulting physician who examines the worker if the team deems it necessary.

The agency communicates with the disabled worker, typically by mail (in which case he is sent a questionnaire to be completed and returned (Pet. App. 72A–75A)), or by telephone, and asks him to furnish information concerning: his present condition, his belief as to whether he is able to return to work, any current medical restrictions, the sources of treatment for his disability, the nature and extent of any employment in the past year, and any vocational rehabilitation services he is receiving. CM § 6705.1; DISM § 353.3. The beneficiary is also invited to submit any additional information relevant to the determination of his continuing entitlement. If necessary, the SSA district office will assist the state agency in obtaining the desired information from the beneficiary. CM § 6705.1 (c); DISM § 353.3B.[8]

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[8] If a worker fails to cooperate by submitting evidence of continuation of his disability or presenting himself for a medical examination, a determination of cessation of disability may be made for that reason (20 C.F.R. 404.1539(c)), but only if (DISM § 356.1A):

"(1) a continuance issue cannot be resolved with the evidence of record, (2) efforts to have the beneficiary cooperate in obtaining the necessary evidence have been appropriate and reasonably complete but unsuccessful, and (3) the evidence indicates that in spite of such efforts the beneficiary's failure to cooperate will continue."

As outlined in DISM § 356.1, however, before making such a determination the state agency and the district office must make (and document) "every reasonable effort" to communicate with the worker personally, to secure his cooperation, and to resolve the issue on the available evidence, and must tell the beneficiary that unless he cooperates by a specified date his

Unless there is clear-cut evidence of medical recovery,[9] the state agency will attempt to obtain information from medical sources regarding the beneficiary's current condition. DISM § 353.2B. It solicits such medical information from the beneficiary's treating sources, and obtains a consultative medical examination when appropriate (such as when there is a conflict between information furnished by the beneficiary or his physician and that obtained from other sources) or necessary (such as when there is no current medical evaluation of the beneficiary). DISM § 353.4.[10]

Upon completion of its investigation of the beneficiary's current condition, the state agency tentatively determines whether the beneficiary's disability has ceased and, if so, the month in which it ceased. DISM §§ 353.2E, 353.5.

If, however, the medical evidence conflicts with the beneficiary's assessment of the severity of his impairment or the date of its cessation, before the state agency's tentative determination becomes final the beneficiary is: (1) informed of the proposed adverse

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benefits might be terminated. Similar stringent procedures apply when the worker cannot be located. DISM § 356.2. In either case, moreover, if the worker subsequently agrees to submit evidence the case will be reopened and appropriate action taken on the basis of all the evidence. DISM § 356.3.

[9] Clear-cut evidence of medical recovery is deemed to exist when a beneficiary who was scheduled for a medical reexamination returns to full-time work without any significant medical restrictions. DISM § 353.2B.

[10] The state agency is obliged to ensure that medical source evidence used to establish the absence of continuing disability is in writing, with the source properly identified. DISM § 353.4C.

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action;[11] (2) given a summary of the evidence upon which it is based, followed by an opportunity for the worker or his representative[12] to review it[13] and to respond in writing in at least ten working days; and (3) given additional time (20 to 30 days) if needed to obtain and submit additional evidence in support of

[11] State agencies ordinarily communicate with beneficiaries by letter, but they do occasionally call beneficiaries. Any telephone or face-to-face communications between the beneficiary and the state agency are documented in the beneficiary's file, which also includes copies of all correspondence. CM § 6705.3(d)(1).

[12] A beneficiary may be represented before SSA or the state agency by any practicing attorney or other qualified person at any stage of the entire proceedings, including the period before an initial determination is made. 20 C.F.R. 404.971–404.972. (Typical representatives include attorneys, veterans' service officers, officials of labor unions, fraternal or religious organization, as well as friends or relatives of the worker.) Such representatives may charge fees, which, pursuant to the Act and regulations may be paid by the Secretary out of past-due benefits established in the proceeding. 42 U.S.C. 406; 20 C.F.R. 404.975–404.977. See generally *Staff Report* 430–432.

[13] The beneficiary and any representative are entitled to a detailed summary, including the specific findings of the medical evidence, and are entitled to examine all other evidence. In addition, the representative is permitted to examine the actual medical evidence. However, in accordance with accepted medical practice for the protection of the doctor-patient relationship, the worker is not presently entitled to examine the medical evidence, and state agencies are instructed to use care in mentioning to the worker information in medical reports that may be embarrassing or harmful to him, such as family affairs, mental illness, and malignancies. CM § 7314. See also 20 C.F.R. 401.3(a)(2). These limitations are currently under review as part of a comprehensive study to determine the extent to which practices and policies of the Department may be affected by the recently-enacted Privacy Act of 1974, which goes into effect in September 1975. 88 Stat. 1896.

his claim. DISM § 353.6. Such summaries of the evidence are "tailored to individual case situations and * * * prepared in such a manner as to enable beneficiaries to understand better the reasons for cessation." DISM § 353.7A. In a substantial number of cases the beneficiaries make further submissions in response to this notice.[14]

After taking into account any response by the beneficiary,[15] the state agency makes its determination. In many cases where the beneficiary makes a further submission the state agency alters its tentative determination and concludes that the worker is still disabled. If the determination remains adverse to the beneficiary, it must be supported by specific findings and conclusions. 20 C.F.R. 404.905(d). Disability will be found to have ceased as of the month in which the evidence establishes that medical recovery has occurred. 20 C.F.R. 404.1539; CM § 6708(a); DISM § 355.

[14] No data are available about the frequency of such further submissions, nor of the frequency with which the state agencies revise their tentative determinations as a result thereof. SSA informs us, however, that in at least a substantial proportion of the cases in which the determination is disputed, further submissions are made.

[15] The state agencies generally do not interview the worker. They are not barred from doing so, however, if the worker were to so request and to go to the state agency office. If a worker does go to the state agency, or, as happens more commonly, responds to the invitation to present questions to the local SSA district office (see Pet. App. 68A), the office in question will prepare a report of the resulting interview which may include personal observations on the worker's apparent impairments (App. B, *infra*, pp. 44A–45A). Such a report is also prepared by the district office when it is requested to assist the state agency in developing the facts. DISM § 353.3B2.

The state agency forwards its determination to SSA's headquarters in Baltimore for review by a disability examiner in the Bureau of Disability Insurance. 42 U.S.C. 421(c); CM §§ 6701(b) and (c), T6262; Disability Insurance Letter No. II–46 (App. B, infra, 60A–61A); DISM § 352C.[16] The primary purpose of such review is to assure that the state agencies are consistent in applying the uniform standards contained in the state agency agreements and otherwise established by SSA. As we have noted, however, SSA may not itself revise the state agency's determination to be more favorable to the beneficiary; it may only determine that a worker is no longer disabled or that the disability ceased sooner than determined by the state agency (see p. 21, *supra*).[17] If SSA believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it can only return the file to the state agency for further development and the state agency is not obliged to revise its determination.[18]

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[16] Although previously SSA had reviewed all state agency determinations on initial applications concerning disability, in 1972 it adopted a sampling approach in which it reviews only about five percent of the determinations. *Staff Report* 27–30, 206. However, SSA still reviews all state agency determinations about whether a worker is still disabled.

[17] In practice, such cases are returned to the state for reconsideration.

As to initial claims for benefits, in 1969 SSA returned to the state agencies for substantive reasons 6.8 percent of the decisions sustaining a claim of disability. *Staff Report* 209. In 37 percent of the cases returned in the period January to June 1969, the state agencies revised their original decisions from allowance to denial, at times after obtaining additional evidence. *Id.* at 212. The rates for decisions that disability has continued would probably be comparable.

[18] In 1969, SSA returned to the states for substantive reasons 5.4 percent of the state agency decisions denying an initial

Whether it agrees or disagrees with the state agency's determination that a worker is still disabled, SSA notifies the beneficiary in writing to that effect. If the determination is adverse, the notification also informs the beneficiary of the basis for the determination and of the right (discussed at pp. 10A–11A, *infra*) to seek reconsideration. 20 C.F.R. 404.907. A decision by SSA to terminate a worker's benefits (whether based on the state agency's or its own determination of cessation of disability) constitutes an "initial determination" (20 C.F.R. 404.905(d)), as to which the beneficiary has procedural rights of review prescribed both by the Act and by regulation (see pp. 10A–14A, *infra*).

The effect of a determination that the worker is no longer disabled on payment of benefits will vary according to the circumstances. If the worker ceased to be disabled more than two months prior to the determination, the payment of benefits will terminate immediately, for the two-month post-disability grace period (see p. 16, *supra*) would have elapsed. If, however, the disability is found to have ceased near the date of the determination (as it was in respondent's case (see p. 8, *supra*)), then benefits will be paid for an additional month or two, depending upon the dates involved.

(b) *Procedures following termination of benefits.* The Act provides that upon a determination that a worker is no longer disabled the latter may within a period prescribed by the Secretary (which shall not be less than six months (42 U.S.C. 405(b)) request an evidentiary hearing, and is also entitled to judicial re-

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claim of disability. *Staff Report* 209. The states revised their original decisions from denial to allowance in 52.7 percent of the cases returned during the period January to June 1969. *Id.* at 212.

view of the Secretary's final decision pursuant to 42 U.S.C. 405(g). See 42 U.S.C. 421(d).

In addition, the Secretary has by regulation provided that beneficiaries may request reconsideration of the initial determination, even if no new evidence is to be submitted. 20 C.F.R. 404.909–404.916. A request for reconsideration may be submitted to SSA at any time within six months of the initial determination,[19] which period SSA may extend for good cause and other reasons. 20 C.F.R. 404.911; see 20 C.F.R. 404.612; 404.953. Reconsideration must be sought before there can be an evidentiary hearing. 20 C.F.R. 404.917(a). SSA informs us that in 1973, out of 34,600 initial determinations that disabilities had ceased, reconsideration was requested in only 8,800 cases (*i.e.*, 25.4 percent).

Reconsideration is initially conducted by the state agency, but usually not by the same persons that handled the case before. Dixon, *supra,* at 32. The beneficiary may submit new evidence (and he or she frequently does), and the state agency may seek a new or additional physical examination of the worker, may obtain further vocational evidence, or may otherwise update the file. *Staff Report* 239.[20] The state agency then submits its determination on reconsideration to SSA, where it is reviewed in the same manner

[19] The six-month period was established because, in view of the fact that reconsideration is a mandatory step before a hearing may be requested, a period shorter than six months would result in beneficiaries who did not seek reconsideration being denied the six-month period the Act prescribes for requesting a hearing. *Staff Report* 38.

[20] Most states agencies now telephone persons requesting reconsideration when a question requires resolution or when it appears that additional sources of treatment may exist. *Staff Report* 242. The state agencies do not ordinarily interview the beneficiary personally.

as the state agency's original determination about whether the worker's disability had ceased (see p. 8A, *supra*). In a significant proportion of the cases in which reconsideration is sought, the state agency or SSA determines that the worker is still disabled.[21] SSA again notifies the beneficiary in writing of the determination, which, if adverse to the beneficiary, is treated as a "determination" for the purpose of the statutory right to a post-termination evidentiary hearing (see pp. 9A–10A, *supra*). 20 C.F.R. 404.917(a). This notification also informs the beneficiary of the basis for the determination and of the right to request a hearing (20 C.F.R. 404.915), such a request to be filed within six months unless the period is extended. 20 C.F.R. 404.918. SSA advises that in 1973 hearings were requested in 1,900 of the 5,600 cases (34 percent) in which, upon reconsideration it adhered to the determination that disability had ceased.[22]

At the hearing, the beneficiary may submit additional or new evidence of disability, and the administrative law judge (who may also call for the presentation of additional evidence) considers the record *de novo* even if no new evidence is submitted. 20 C.F.R. 404.927. The hearing is non-adversary, and SSA is not represented by counsel or other staff. As at all

[21] As to initial applications for benefits, in 39.5 percent of the cases in which reconsideration was requested in fiscal 1973 the result on reconsideration was favorable to the beneficiary. *Staff Report* 308–309. During the ten-year period from fiscal 1964 to 1973, this rate ranged between 29.9 percent and 39.5 percent. *Ibid.* No data are available about the reasons for different results upon reconsideration.

[22] As of April 1974, the median processing times for all disability cases (including initial applications and terminations) were 74 days for reconsiderations resulting in affirmances, 105 days for reconsiderations resulting in "reversals." *Staff Report* 238.

prior and subsequent stages, however, the beneficiary may be represented by counsel or other representatives. 20 C.F.R. 404.934. In addition, the beneficiary may (but is not required to) appear and testify personally (*ibid.*); witnesses may be subpoenaed (20 C.F.R. 404.926); and they must ordinarily testify under oath and answer relevant questions propounded by the parties. 20 C.F.R. 404.929. SSA, however, need not proffer for confrontation and cross-examination by the beneficiary all persons who have provided the evidence underlying its determination. See *Richardson* v. *Perales, supra.*[23]

SSA informs us that in a substantial proportion of cases the administrative law judge concludes that the worker is still disabled or that the disability continued longer than had previously been determined; including cases in which the worker did not appear.[24]

If the judge rules adversely to the beneficiary, the latter within 60 days may request SSA's Appeal

[23] The median processing time for all disability cases in mid-1974 was 163 days between a request for hearing and the decision. *Staff Report* 238. In addition to the time lag due to processing, as to both reconsiderations and hearings significant delays result from the beneficiaries waiting a substantial part of the six-month period to request further review, even though they are no longer receiving benefits. In cases involving initial application, the mean periods between the adverse decision and the request for further review were 60.9 days for reconsideration requests and 65.6 days for hearing requests. *Id.* at 246.

[24] In fiscal 1973, administrative law judges found for the beneficiary, in whole or in part, in 24,100 (*i.e.*, 45.3 percent) of the 53,100 cases involving initial applications for disability benefits. *Staff Report* 310–311. A study of such cases in fiscal years 1965–1968 found that the judge ruled in the beneficiaries favor in 36.4 percent of the cases in which the worker did not appear (Dixon, *supra*, at 81).

Council to exercise its discretionary authority to review the judge's decision and must do so before seeking judicial review. 20 C.F.R. 404.946.[25] The Appeals Council which engages in *de novo* review, may consider new or additional evidence (see 20 C.F.R. 404.949) and may affirm, modify or reverse the decision of the administrative law judge or may vacate that decision and remand the case to the judge for additional proceedings. 20 C.F.R. 404.950. In fiscal year 1973, the Appeals Council ruled favorably to the worker in 12.3 percent of all disability cases (initial applications and terminations) it reviewed. *Staff Report* 254.

Within 60 days of an adverse decision or denial of review by the Appeals Council, a beneficiary may institute an action in a district court seeking judicial review. 42 U.S.C. 405(g).[26] The court may not take new evidence and must accept the agency's findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. 405(g).[27] In the great majority of cases the agency's decision is affirmed,[28] in which event the disappointed beneficiary is entitled to further judicial

[25] The Appeals Council may also review a case upon its own motion (20 C.F.R. 404.941) or upon certification by an administrative law judge. 20 C.F.R. 404.942.

[26] Judicial review is available only with respect to a "final decision of the Secretary made after a hearing * * *." 42 U.S.C. 405(g).

[27] The court may remand the case to the Secretary for additional findings. 42 U.S.C. 405(g).

[28] In 1973, in disposing of 1,217 disability cases (including both initial applications and terminations) the district courts affirmed the agency in 85 percent of the cases in which the court reached a final decision. *Staff Report* 269. The total number of such cases filed that year was 2,226, in addition to the 2,676 pending at the beginning of the year. *Ibid.*

review in the same manner as with judgments in other civil actions. 42 U.S.C. 405(g).

2. CONTINUING DISABILITY INVESTIGATION CONCERNING WORK ACTIVITY

Because return-to-work cases do not necessarily or usually entail the state agency involvement mandated by the Act, the procedures prior to the post-termination evidentiary hearing stage differ from cases of possible medical recovery. Although this case does not directly challenge the return-to-work procedures, we describe them briefly so that the Court may have a more complete picture of the termination procedures.[29]

Upon receipt of information indicating work activity,[30] SSA's Bureau of Disability Insurance sends the beneficiary a questionnaire (Pet. App. 68A–71A) soliciting information about the nature and extent of the beneficiary's employment, earnings, current medical restrictions, and receipt of any vocational rehabilitation services. CM § 6705.2(b)(1); DISM § 352A.[31] The beneficiary is also invited to provide any additional information he believes important and of assistance to SSA's determination of his continuing entitlement to benefits.[32]

[29] The work activity procedures have been revised to eliminate various roles previously played by state agencies in such cases. See Disability Insurance Letter No. 11–46 (App. B, *infra*, pp. 60A–61A). Accordingly, many of the portions of the DISM in the Appendix to the petition have been superseded by the CM appended to this brief.

[30] Although no precise data are available, SSA informs us that nearly all such information derives from employers' quarterly reports of wages paid (see p. 3A, *supra*, n. 5).

[31] The form also states: "If you have any questions, or need help in filling out the form, please telephone or visit any social security office" (Pet. App. 68A).

[32] Because of the nature of the questions typically presented, in cases involving self-employment, agricultural employment, or

The Bureau reviews the beneficiary's response to the questionnaire to determine whether an issue of continuing disability is actually present. When the response is clear and complete and there is no material conflict in the evidence, the Bureau's determination of continuing entitlement will be based solely upon the work activity information reported by the beneficiary. However, when the response is inadequate or conflicts in any way with evidence indicating that the beneficiary is engaging in substantial gainful activity, or when the beneficiary fails to respond, the Bureau will have the SSA's district office[33] nearest the beneficiary communicate with him personally[34] to clarify any factual differences or misunderstandings or to solicit the desired information. CM §§ T6263, 6705.3(c)–(d); DISM § 352.A.4, B). Upon completion of this investigation, the SSA district office evaluates all the evidence and prepares a proposed determination as to the beneficiary's continuing entitlement. Disability Insurance Letter No. 11–46 (App. B, *infra*, pp. 60A–61A).

Before this determination becomes final, however, in cases where the evidence conflicts in any way with the beneficiary's statements about the amount of earnings, periods of work, or date of its cessation, SSA: (1) informs the beneficiary of the proposed adverse determination (2) provides a brief summary of the evidence on which it is based and a reasonable oppor-

voluntary report of work activity with a future medical reexamination date, the SSA district office nearest the beneficiary will, instead, personally interview him. CM § 6705.2(c).

[33] There are over 1,200 SSA district offices and branch offices. *Staff Report* 135.

[34] Any telephone or face-to-face communications by the SSA district office are documented in the beneficiary's file, which also includes copies of all correspondence. CM § 6705.3(d)(1).

tunity (at least ten working days) to respond in writing or in person to the SSA district office, and (3) upon request, gives the beneficiary additional time (20 to 30 days) to obtain and submit additional evidence in support of his claim. CM § T6273(e). As with medical recovery cases, the summary of the evidence is tailored to the individual case and is prepared so as to enable beneficiaries to understand the reasons for the determination. CM § T6273(c), (d). After taking into account any response by the beneficiary, the SSA district office then makes its determination which it forwards to the Bureau of Disability Insurance for review by a disability examiner.[35]

When the Bureau determines that disability has ceased, it so advises the beneficiary, giving the effective date of cessation. Cessation of disability because of work activity will be found to occur: (1) as of the first month after expiration of the nine-month trial work period (see p. 25, *supra*) in which the evidence establishes that the beneficiary has demonstrated a capacity to engage in substantial gainful activity; or (2) if he is not entitled to a trial work period (see p. 25, *supra,* n. 29), as of the first month in which he demonstrates a capacity to engage in substantial gainful activity. CM § 6708(b). Such an "initial determination" that disability has ceased results in termination of the payment of benefits (subject to the two-month grace period (see p. —, *supra*), and is subject to essentially the same procedures for

[35] When the Bureau's review reveals a material deficiency in the determination, the Bureau will either revise the determination or return the case to the district office for additional information. CM § T6275.

reconsideration,[36] evidentiary hearing, Appeals Council review and judicial review that we have already discussed (see pp. 10A–14A, *supra*). According to SSA, however, in relatively fewer return-to-work cases than in medical recovery cases does the beneficiary seek these additional modes of review, perhaps because the issues in return-to-work cases admit of less difference of opinion.

[36] The reconsideration of an initial determination based upon return to work does not involve the state agency; such reconsideration is ordinarily undertaken by the district office. CM § T6266(c).

APPENDIX B

Continuing Disability—General

6700. The Obligation To Investigate Continuance of Disability.—Disability ceases when the individual's physical or mental impairment is no longer of such severity as to prevent him from engaging in SGA or, subject to the trial work period provisions, he demonstrates, by working, the ability to engage in SGA (except in certain cases based on statutory blindness).

The Administration has an obligation to terminate disability benefits and freeze periods when an individual is no longer under a disability. Events and circumstances which will result in the initiation of a continuing disability investigation are described in § 6705. The primary purpose of a continuing disability investigation (CDI) is to obtain complete, current information about the disabled individual's condition and any work activity since the last contact with him. The information is required so that an evaluator may be in a position to determine whether the individual is still under a disability.

6701. Responsibility of Various Offices.—Responsibility for identifying and developing potential continuing disability issues is shared by DO's, SA's, and BDI.

● (a) *District Offices.*—DO's may become aware of continuing disability issues either through a direct beneficiary contact or a CDI request from BDI. Most CDI's are initiated in BDI as a result of earnings postings, voluntary reports, or scheduled medical reexaminations, but there are some cases in which the beneficiary makes a report (i.e., work activity, medical improvement) directly to the DO. Irrespective of the manner in which the DO learns of a CDI issue, cases should be developed and transmitted in accordance with instructions in this chapter. (All medical evidence development is initiated by the State agency. A DO will accept medical reports voluntarily brought in by the beneficiary or submitted in his behalf, but will not request medical evidence.)

● (b) *State Agencies.*—Medical development of continuing disability cases is the responsibility of the SA's because they are especially equipped to obtain specific medical information in a given case and can pinpoint the development of clinical and laboratory findings in the light of evidence already in the file. After the SA obtains medical or other evidence that may be required, they prepare a determination of continuance or cessation and forward the case to BDI for review.

● (c) *Bureau of Disability Insurance.*—BDI examines all incoming information which raises a question of possible medical recovery or indicates an ability to work, and screens out cases in which a CDI is not required. BDI determines whether DO and/or SA action is required and also approves SA determinations or recommends further development. BDI notifies the beneficiary and the DO of the final decision.

6702. Continuing Disability Issue—General.—The issue of continuing disability will arise in two types of situations: (1) where there is a reasonable likelihood that the individual's condition may have improved, and (2) where the individual's condition has not improved but there is work activity. Future medical reexamination dates are established in those cases where the medical evidence indicates that sufficient improvement may occur to permit return to substantial gainful activity at some later time.

When a beneficiary for whom a medical reexamination diary has been established returns to work his return to work before the months the diary will fall due may be an indication of medical recovery, and justifies an immediate investigation of whether or not he has in fact recovered, without regard to the trial work period. If the State agency finds that he continues to have a disabling impairment, his case will not be investigated and evaluated again until he has worked in 9 months, or when a subsequent medical reexamination diary matures, or affirmative evidence of medical recovery is received, whichever date is earliest.

When a beneficiary for whom recovery is not likely (no medical reexamination diary has been established) returns to work, he will continue, as in the past, to work in his trial work period without reexamination of his medical condition, unless BDI or the SA receives affirmative evidence of medical recovery.

A beneficiary for whom a medical reexamination diary has been established is notified that we have scheduled a medical followup at a future date and that he should notify us if he returns to work. The notice is furnished with his award certificate in an initial case and his continuance letter after a continuing disability investigation. It is also most important that DO's always explain to the beneficiary

(or in reply to general inquiries) that the trial work period continues only so long as he continues to have a disabling physical or mental impairment (see § 6703.6).

6703. Work Activity—Trial Work Period.—The law provides a trial work period without loss of benefits for persons determined to be under a disability who have not medically recovered (see § 6703.2(*c*) for exception). The individual who has not recovered medically may render "services" in as many as 9 calendar months (not necessarily consecutive) during which his work, regardless of the magnitude, will not be used as the basis for determining that disability has ceased. Not until after 9 months of services will his work be considered in determining whether he has demonstrated ability to engage in SGA. After the end of the trial work period, any such services (including the services rendered during any of the 9 months) may be considered in determining whether he is able to engage in SGA any month thereafter.

6703.1 Trial Work Period—Definition of Services.—(*a*) *General.*—The term "services" means activity in employment or self-employment which is performed for remuneration or gain or is determined to be of a type normally performed for remuneration or gain. Since the trial work provision is intended to give a disabled beneficiary the opportunity to test his ability to work and hold a job, minor work activity may generally be disregarded. Therefore, work activity in *employment* in a month will constitute "services" only if it is actually or usually performed for remuneration or gain, amounting to more than $50 either in cash or in kind. Work activity in *self-employment* will be determined to be "services" only where net earnings in a calendar month are more than $50 for a month or the self-employed person spends more than 15 hours in that month in the work activity.

In some SE cases it may not be possible to isolate from the total net earnings the net earnings for each particular month of self-employment. When this occurs after full development divide the net earnings for the particular work period by the months of self-employment to find net earnings per month. Cases where remuneration for employment is in the form of commissions should be handled in a similar manner.

● (*b*) *Activity Which Does Not Constitute "Services" for Purpose of Charging Trial Work Period Months.*—Activity performed by a beneficiary for which payment in excess of $50 a month is made does not constitute "services" if the activity, although resembling services in employment for remuneration or gain, is:

(1) part of a prescribed program of medical therapy, and

(2) carried out in a hospital under the supervision of medical and administrative staff; and

(3) is not performed in an employer-employee relationship; and

(4) is not normally performed for remuneration or gain.

See SSR 69–46 for a case illustrating activity performed under these circumstances. When appropriate, the DO will develop the question of employer-employee relationship (§§ 1200 and 4520 ff.). When forwarding cases where activity of this nature is involved, the DO will annotate the Transmittal SSA–831, "Work Therapy Plan in Hospital, no "Services" for TWP."

6703.2 When the Trial Work Period Does Not Apply.—(*a*) *Freeze Cases.*—A person entitled to a freeze only is not entitled to a trial work period. Examples of freeze only cases are:

(1) Individual is entitled to a freeze only because of railroad or military service credits that may be used toward a freeze but not toward entitlement to DIB (§ 6010).

(2) Individual is statutorily blind but is not entitled to a disability insurance benefit (§ 6060(*a*)).

(3) Individual in freeze status fails to file for DIB for some other reason.

● (*b*) *Only One Trial Work Period During a Period of Disability.*—An individual will not be entitled to more than one trial work period within the same disability period.

● (*c*) *Subsequent Period of Disability.*—If an individual's subsequent period of disability begins within 5 years after the termination of an earlier freeze or DIB, he may become entitled to DIB without serving a waiting period. In such cases the trial work period provision does not apply.

There are cases, however, where a claimant becomes reentitled to DIB within 5 years after a prior termination but he is not paid for the full number of months he is disabled. This can occur where the subsequent application is not filed until 18 or more months after the onset of the subsequent disability; since benefits can be paid retroactively for only 12 months, a beneficiary in this situation will have a period of 6 or more months after onset in which he does not receive benefits. Where a beneficiary does actually in effect serve a 6-month waiting period, he is entitled to a trial work period.

NOTE: Even though a childhood disability beneficiary does not serve a waiting period he is entitled to a trial work period if it is found he has not recovered medically when he returns to work. If a CDB later becomes simultaneously entitled to DIB on his own account number, or his CDB is terminated and he later becomes entitled to DIB on his own account number, he must serve a 6-month waiting period before he can receive DIB. He is, therefore, entitled to a trial work period as a DIB (irrespective of whether he worked in a trial work period as a CDB). This remains true even if his period of disability and his entitlement to DIB occur within 5 years of his termination of CDB.

● (*d*) *Disabled Widows, Surviving Divorced Wives and Widowers (DWB).*—A person entitled to (DWB) benefits is not entitled to a trial work period.

● (*e*) *Certain Statutorily Blind Workers Age 55–64.*—The special blindness provision (§§ 6060(*b*) and A6060(*e*)) in the law is applicable in cases where the individual is age 55–64 and statutorily blind. Under this special provision, disability for these individuals is defined for purposes of entitlement to disability insurance benefits as the inability by reason if such blindness to engage in SGA requiring skills or abilities comparable to those of any SGA in which he engaged prior to onset of blindness or age 55, whichever is later. Generally, the skills or abilities required in the performance of SGA after age 55 or onset of blindness, whichever is later, should be compared with those of his previous regular work.

The trial work period will not apply for an individual who is entitled by virtue of the special blindness provisions, unless:

(1) He returns to work which is comparable to the activity he engaged in during the 10 years prior to blindness or age 55, whichever is later, or

(2) His last previous work activity was termi-

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nated because of impairment or other reasons related to his capacity to engage and his return to work involves a significant vocational adjustment.

6703.3 When the Trial Work Period Begins

The trial work period begins with the month in which the beneficiary has filed an application and becomes entitled to DIB or, in the case of a disabled child beneficiary who has attained the age of 18, with the month in which he attains age 18 or the month in which he becomes entitled to such benefits, whichever is later. The 9 months of trial work (whether or not such 9 months are consecutive) will be counted beginning with the first month within the trial work period in which a beneficiary, who has not recovered medically, performs services.

Example 1: Beneficiary became entitled to DIB for 11/69 by an application filed 12/69 and begins work 3/70. The trial work period begins 12/69 and counting of trial work months begins 3/70.

Example 2: Beneficiary became entitled to DIB in 2/71 by an application filed 1/71; his onset date is 7/15/70 and he begins work 12/70 (during the waiting period); work during the waiting period was determined to be not SGA. Trial work period and counting of months of trial work begins 2/71.

6703.4 When the Trial Work Period Ends

The trial work period ends with the 9th month in which the beneficiary has worked in the trial work period or when his disability ceased for reasons other than work (e.g., medical recovery) whichever is earlier. Therefore, the fact that most individuals are entitled to a trial work period beginning with the first month of entitlement does not mean that they are automatically entitled to 9 months of trial work.

Example 1: Beneficiary entitled 7/69 by an application filed 7/69 (no medical reexamination established and medical recovery has not occurred); begins work in 1/70 and continues in all succeeding months. Trial work period ends with 9/70.

Example 2: Beneficiary entitled 7/69 by an application filed 7/69 (no medical reexamination established); begins work in 6/71. In 9/71 he submits a medical report from his attending physician indicating medical improvement (i.e., affirmative evidence). Based on further medical development cessation is found 10/71 based upon medical recovery.

Example 3: Beneficiary entitled 7/71 by an application filed 7/71 (medical reexamination established for 6/72) begins working 1/72. Evidence shows medical recovery in 1/72. Disability ceases 1/72.

6703.5 Evaluation of Work Activity After 9 Months of Trial Work

After an individual has worked in 9 months, the SA in determining whether his disability has ceased will review all medical and nonmedical factors, including the claimant's work before, during, and after the trial work period.

When the individual has demonstrated by working that he is able to engage in SGA, cessation is established as of the first month, after the end of the trial work period, in which the evidence establishes the individual is able to engage in SGA. This may be the first month after the last month in the trial work period or any subsequent month, depending on the facts in the case. It is not necessary for the individual to still be working in the month of cessation. For example, if the SA receives a case in the 9th month of work which shows that the individual stopped working in the 9th month cessation may be found in the 10th month.

6703.6 Explaining the Trial Work Period

Any time the trial work provision is being explained to a beneficiary, it should be pointed out that medical recovery will prevent a person from receiving the full benefit of the trial work provision. A beneficiary for whom a medical reexamination diary has been established will be notified that we have scheduled a medical followup at a future date (see § 6702) or he will be contacted upon release from a hospital and that he should notify us if he returns to work. It should be explained to the beneficiary that the trial work period continues only so long as he has not recovered from his medical impairment, that a prompt report must be made when he returns to work, and that we will evaluate his condition at that time to determine whether his impairment remains at a level of severity which will permit him to receive benefits in a trial work period.

6705. Circumstances Which Raise a Question of Continuing Disability

During the course of an individual's period of disability various situations occur which indicate that there is a need for a continuing disability investigation to determine whether, in fact, an issue of continuing eligibility does exist. It is the function of the DO to develop and record accurately the pertinent information leading toward resolution of the specific issue at hand. Although a comprehensive report of an individual's disability status is desirable, the type and appropriateness of development will depend upon the circumstances in each individual case. For instance, development of an isolated wage posting, in the absence of any other change in status, should not require the extensive interview required when the reason for investigation involves possible medical recovery. The techniques for conducting a continuing disability interview are much the same as those used when the beneficiary first filed application for disability benefits. Essentially, the beneficiary's allegations concerning impairment, work, and the circumstances surrounding any change in his disability status must be fully described. Any one of the following situations warrants the initiation of a continuing disability investigation.

(a) Voluntary Reports

Notices indicating that a beneficiary has improved or returned to work may be received in BDI or the DO in the form of a letter or cards designed expressly for reporting these events and issued periodically by SSA to beneficiaries.

The individual sometimes reports personally to the DO that his disability status has changed. Occasionally, information is received from persons wishing to remain anonymous. In any event, all such notices initiate the investigative procedure.

(b) Change of Address or Request for Change of Payee

When a notice is received that a disabled individual's address is being changed from a hospital to a private residence the possibility of recovery exists. The extent of development requested by BDI will depend on the facts in any one given case; however, the status of the individual's physical or mental impairment must be ascertained. In cases involving mental impairments, a change to a private residence is usually accompanied by a request for change in payee from representative payee to the beneficiary himself. The two issues, if presented, should be developed simultaneously. Instructions for payee development are contained in § 3014.

(c) Release From Hospital

Release from a hospital is usually an indication of some improvement in an individual's mental or physical condition. Not all hospitals maintain the same policy regarding the extent of improvement which would warrant release. However, when an individual is released, confinement of strict medical regimen may no longer be necessary. It is, therefore, necessary to investigate and update the beneficiary's file to aid BDI and the SA in determining whether current or future medical evaluation is desirable.

(d) Vocational Rehabilitation Notices

State Vocational Rehabilitation agencies attempt to rehabilitate those individuals who have the potential for future reemployment. These agencies are valuable sources for furnishing information relating to a beneficiary's medical or rehabilitative progress. Generally, the VR agency will notify BDI at the point in time where the individual with whom they have worked is about to, or has reached his potential for returning to the labor market. When such a notice from a VR agency is received it is regarded as warranting a continuing disability investigation.

(e) Reported Earnings

BDP maintains a control on the record of each individual for whom disability has been established. Any earnings reported for such an individual, receive a computer screening and, where necessary, are reviewed by an examiner to determine the basis for the earnings and their amount. Wage postings oftentimes represent sick pay, vacation pay, late reporting by a former employer, etc. However, they may also represent a return to employment. If, after this screening, the wage postings are not satisfactorily explained, BDI will initiate a continuing disability investigation to establish whether a beneficary's disability status has changed.

See § 6743 for explanation of earnings sheet CDI–805, the form on which BDP shows these postings, which will usually be inserted in the claims folder.

(f) Required Medical Reexamination

Medical reexamination dates are established (based on the evidence in file) in those cases where the impairment(s) is expected to improve sufficiently to enable the beneficiary to engage in sub-

stantial gainful activity. When the date of the medical reexamination is reached, BDI requests the SA to undertake an investigation to determine the status of the individual's physical and mental condition (see § 6705.1).

(g) Miscellaneous

The DO and BDI often are contacted by individuals who formerly were receiving disability benefits or were in freeze status and who request information concerning benefits. Some of these persons may have had their period of disability terminated for failure to cooperate, because their whereabouts were unknown, etc. In certain cases benefits may merely be in suspense status or as in a freeze case benefits may not have been awarded. In order to bring the claim file up to date, BDI may request a continuing disability investigation before initiating payment or reinstating benefits.

6705.1 Issues of Medical Recovery Including Medical Reexamination Diary Procedures

(a) General

Medical recovery occurs when the medical and vocational evidence establishes that the beneficiary's functional capacity has been sufficiently restored to enable him to engage in substantial gainful activity regardless of whether there has been an actual return to work. Disability ceases when medical recovery occurs, even though the beneficiary may not have used the full 9 months of a trial work period. It is, therefore, urgent that an investigation of a continuing disability issue involving a possibility of medical recovery be completed promptly, documented fully and, when it is necessary, timely suspension action be taken to prevent overpayments within the cautions set forth in § 6706.

Medical recovery issues, including matured medical reexamination diary cases, are sent by BDI directly to State agencies (SA) for development and adjudication. The SA contacts the beneficiary to determine his current treatment sources and his opinion as to his medical condition and its effect on his ability to work. When the contact is by mail, the beneficiary is asked to complete Form SSA–454(a) (Social Security Disability Beneficiary Report). When the contact is by telephone, the SA completes Form SSA–454(a), records the name of the individual supplying the information, and secures written confirmation. It then obtains whatever medical documentation is needed by contacting the beneficiary's medical sources and, if necessary, independent sources for the facts concerning the beneficiary's current medical condition.

When the medical evidence conflicts *in any way* with the beneficiary's assesament about the severity of his impairment, or about the date of cessation of such impairment, the SA again contacts the beneficiary before requesting suspension or preparing a determination of cessation. It informs him of the proposed suspension or cessation, the reasons therefor, and his right to rebut the proposed action. After the beneficiary has had the opportunity to submit rebuttal evidence and/or all conflicts are resolved, a determination is prepared and the file is forwarded to BDI. There are two instances in which the DO will become involved: (1) when the SA requires DO assistance (subsection (*c*) below), and (2) when the beneficiary feels he needs help and calls or visits the DO (see Subsection (*b*) below).

(b) Beneficiary Requests DO Assistance

(1) SA CONTACT IS BY MAIL

Form SSA–454(a) contains the statement—"If you have any questions, or need help in filling out the questionnaire, please telephone or visit any social security office." Hence, when the beneficiary contacts the DO for assistance, the DO should provide whatever assistance is needed to complete this form. If a beneficiary comes to the DO without this form, the DO should utilize Form SSA–454 (Report of Continuing Disability Interview (see § 6749)) and, if needed, Form SSA–821 (Work Activity Report) (see § 6748). Upon completion forward all material to the SA. (Note: Form SSA–454(a) (see § 6746) will *not* be stocked for DO use in conducting a CDI.)

(2) SA CONTACT IS BY TELEPHONE

When the SA contact with the beneficiary is by telephone, Form SSA–454(a) is used to record all pertinent information obtained. The SA then sends the completed form to the beneficiary for his review, signature and return to the SA. If the beneficiary comes to the DO with Form SSA–454(a) (or other communication) completed by the SA, it may be that he does not understand the issue, the intent and/or the need for furnishing the information to the SA. There may also have been a misunderstanding in the recording of certain information. It is therefore necessary for the DO(1) to review the responses entered on Form SSA–454(a), (2) to assist in answering any questions, and (3) to clarify any possible misunderstanding. If the beneficiary objects to signing the form, the DO will obtain a statement outlining the beneficiary's objection and prepare an RC to record the interview. Upon completion, forward all material to the SA.

(c) Referral of Cases by the State Agency

When the beneficiary does not respond to the State agency inquiry, or if his responses are inadequate or illegible, and in other instances where additional information is needed, the State agency may request assistance from the district office. These requests may include cases in which development on the Form SSA–401 (Medical History and Disability Report) was curtailed when the initial application was filed, and the State agency is unable to obtain the needed documentation, or when the completed questionnaire reveals that the beneficiary has worked and this factor needs additional documentation.

When a State agency requests assistance from a DO, the Form SSA–883 (Request for Field Investigation of Continuing Disability) will usually contain an appropriately detailed explanation. If the State agency does not specify the exact development needed or the needed evidence is not clearly apparent to the district office, the district office should complete a Form SSA–454 (Report of Continuing Disability Interview) and/or a Form SSA–821 (Work Activity Report) as is customary under § 6732. Upon completion of the necessary action, the file should be returned to the State agency. When the district office cannot locate the beneficiary or he refuses to cooperate, document the file and process in accordance with §§ 6736.4 and 6736.5.

6705.2 Continuing Disability Investigations —Work Activity

(a) General

One of the principal goals of the Social Security Administration is to assure that beneficiaries get their monthly checks without delay or interruption so long as they continue to be eligible for such benefits. When benefits are no longer due, payments must be stopped as promptly as practicable, but *only* when consistent with the objective of affording the beneficiary "due process." Hence, it is essential that prior to any action to stop disability benefit payments, the beneficiary (or his representative payee) (1) must be given a meaningful pre-determination notice of any adverse action to be taken and the basis for the action, (2) must have an opportunity to present any additional information or evidence that he feels may have a bearing on the proposed decision, and (3) subsequently, when a formal determination is effectuated, must be given written notice of the determination (including the rationale) and informed of his rights to relief and appeal under the law.

(b) BDI Development and Review of Evidence

(1) DIRECT MAIL CONTACT WITH BENEFICIARY BY BDI

Cases involving work activity are generally identified by BDI and developed directly with the beneficiary (or payee) by means of a letter-questionnaire. In some instances the DO is the first to become aware of information or evidence which requires a continuing disability investigation (see § 6705). In cases where the issue is identified by BDI, BDI mails Form SSA–821(a) (Report of Work Activity—Continuing Disability) (see § 6747) to the beneficiary for completion and requests that the beneficiary return the form directly to BDI. A postage-free envelope pre-addressed to BDI is enclosed for this purpose. The letter-questionnaire informs the beneficiary that the information he submits will be used to determine his continuing entitlement and, if it is determined that he is no longer entitled, benefits will cease. The questionnaire solicits details regarding any recent work activity. It also asks about current medical restrictions and invites the beneficiary to submit any additional information or statements that he believes are important in deciding his continuing entitlement.

This development technique is used by BDI (1) in all instances where a trial work period (TWP) diary date matures, (2) when unexplained postings are reported to a beneficiary's earnings record, (3) in most instances where a beneficiary voluntarily reports a return to work, (4) when a notice is received that the beneficiary has successfully completed a VR training program, and (5) in any other situation not listed as an exclusion (see subsection (*c*) below).

Suspension action will not be taken until the beneficiary has been notified of the proposed suspension, the information and evidence upon which it is based, and given an opportunity to submit rebuttal information and evidence. Moreover, when the evidence materially conflicts *in any way* with the beneficiary's assessment about his engaging in SGA, the proposed date of cessation, entitlement to a trial work period, or where evidence is received from a 3rd party (e.g., employer), the beneficiary must be contacted by the DO to resolve the conflict (or to confirm 3rd party evidence) before

"due process" is satisfied and a cessation determination can be prepared by the SA (§ 6705.3(c)).

(2) BDI REVIEW AFTER INITIAL DEVELOPMENT

When Form SSA–821(a) is returned by the beneficiary, BDI will review the response to first determine whether an issue of continuing disability is actually present. Certain situations, e.g., (1) the beneficiary is entitled to additional months of a TWP, (2) posted or reported earnings represent sick or vacation pay or are otherwise determined *not* to represent actual work, or (3) earnings are clearly below the SGA level, are disposed of as "no issue" cases and notification is sent by BDI to the beneficiary that benefits are continued. Cases where a substantive issue is present will be sent by BDI to the SA for adjudication. When Form SSA–821(a) is not returned by the beneficiary or is returned and the responses are inadequate or the information submitted creates a conflict, BDI will request assistance from the DO (see § 6705.3).

(c) DO Development and Review of Evidence—Complex Work Issues

Because of special developmental requirements, the following categories of work issues will not be developed by direct mail by BDI: (1) self-employment work activity cases, (2) agricultural employment cases, and (3) voluntary reports of work activity before a medical reexamination diary has matured.

In these situations, BDI will forward the folder to the DO to conduct a personal interview (either by telephone or face-to-face) with the beneficiary and complete Form SSA–821. The DO will clearly explain to the beneficiary that his benefit payments may be stopped as a result of this investigation, and that he has the right to submit any evidence or make any statements he desires to be considered. If the beneficiary wishes to make any statements, use Form SSA–795 (Statement of Claimant or Other Person). If the beneficiary desires to submit additional evidence, ascertain what evidence is to be obtained, whether the DO can be of assistance in obtaining the evidence, and where necessary, allow the beneficiary a reasonable period of time (e.g., 10 to 20 days) to gather and present any evidence. The DO should control the case, follow-up to assure the timely receipt of the beneficiary's evidence and annotate the file accordingly.

In all cases the DO will enter in the remarks section of Form SSA–821 (or on an RC), the following statement—"The Beneficiary was informed on _____ (give date) that this investigation may result in his benefits being stopped and he has been given the opportunity to submit evidence and make any statement on his behalf." The DO will follow the instructions in §§ 6705.3 for subsequent processing.

6705.3 District Office Responsibilities—Work Activity

(a) General

While the majority of CDI's involving work issues will be sent by BDI (following development) directly to the SA for adjudication or handled as "no issue" cases by BDI, in certain cases the DO will be required to develop evidence in greater detail or to clarify conflicts in the existing evidence.

(b) Request for Assistance From the Beneficiary

As indicated in § 6705.2, BDI sends the beneficiary a questionnaire on work activity (Form SSA–821(a)). The form advises the beneficiary to call or visit his Social Security office if he has any questions or difficulty in completing the questionnaire. In the event a beneficiary does call or visit regarding the questionnaire, the DO will give him all the assistance he requires, including assistance in completing the Form SSA–821(a).

If the beneficiary comes to the DO without Form SSA–821(a), the DO will complete Form SSA–821, following the procedures in § 6712, and forward the material to BDI. Also, where it is apparent to the DO that the evidence presented by the beneficiary will result in termination of benefits, the DO should explain this to the beneficiary to prepare him for the subsequent check stoppage. The DO will document the file with an RC. (If a beneficiary reports by mail (i.e., Form SSA–612 or letter) or by telephone that he has returned to work, acknowledge receipt of the information (send a replacement Form SSA–612 when necessary) and ~~forward to BDI for initiation of a CDI.)~~

(c) Request for Assistence from BDI

The following types of cases will be sent to DO's for their assistance in resolving work issues.

(1) BENEFICIARY DOES NOT RESPOND TO QUESTIONNAIRE

Where the beneficiary does not respond to the questionnaire within 45 days, BDI will send the case folder and a new SSA–821(a) to the DO with a request to contact the beneficiary and assist him in completing the questionnaire. Upon completion of the questionnaire, (see following subsections for

[Use procedures in § 6730 §§. if the reported event results in a CD issue, otherwise, proceed to 302 §§ - disposition].

development techniques)the DO should mail the completed form and other evidence to BDI or SA immediately (see subsection (e) below).

Should contact with the beneficiary reveal that he has already mailed the questionnaire to BDI, the case folder should be immediately returned to BDI with the notation "Beneficiary mailed SSA–821(a)to BDI on _____ (give date, if available)."

(2) BENEFICIARY'S ANSWERS TO THE QUESTIONNAIRE ARE INCOMPLETE OR INADEQUATE

Where the beneficiary's answers to the questionnaire are considered incomplete, inadequate or illegible, BDI will send the case folder to the DO explaining what development is needed. When interviewing the beneficiary, the DO will explain why additional evidence is being obtained. The case should then be processed in accordance with the instruction in subsection (e) below.

(d) Need for DO To Resolve Conflicts

(1) BENEFICIARY'S ANSWERS CREATE A CONFLICT IN THE FACTS

When the evidence points to a cessation but a material conflict arises from the beneficiary's answers on form SSA–821(a) (or other evidence), BDI will forward the folder and other evidence to the DO to contact the beneficiary and to resolve conflicting facts. The DO should inform the beneficiary by mail (or personal contact) of the conflicting statements. Copies of all correspondence sent the beneficiary must be included in the file. When an oral contact is made, the DO must fully document its file to show the reason for the contact and the results of the interview. Include in the file any additional information or evidence submitted by the beneficiary.

Also, where it appears clear that a cessation of benefits will result, the district office should advise the beneficiary of the reasons why such action may be required, and if necessary, explain to him the pertinent provisions of the law. The DO should document the file accordingly (see (2) below where there is a misunderstanding of disability policy). See § 6706(f) for due process requisites prior to suspension.

(2) CONFLICTS OF UNDERSTANDING

Where there is a conflict of understanding (e.g., it is evident that the beneficiary does not understand SSA policies) or of the legal significance of the facts (e.g., beneficiary states on form SSA–821 (a) that he does not believe facts justify termination of benefits), the DO will be required to contact the beneficiary in an effort to resolve the misunderstanding. The DO should explain to the beneficiary the rules in question and the significance of the facts, how they are applicable to his case, and that the rules or facts may result in the termination of his benefits.

Reference to the "Rights and Responsibilities" booklets and other informational material available should be made by the DO. The DO should always document the file fully with an RC, and where the beneficiary desires to make a statement, it should be recorded on form SSA–795.

(3) EVIDENCE FROM THIRD PARTY

When evidence in support of a cessation is not received from the beneficiary himself or from the payee, the beneficiary or payee should be advised of the evidence received and given the opportunity to object if he believes the evidence is not correct. When the beneficiary is in disagreement with the evidence, the DO should provide whatever assistance the beneficiary needs to obtain additional evidence.

(e) Routing Procedures

The following routing procedures should be followed by the DO.

(1) FORWARD FOLDER TO SA

The DO has the folder when it finds that the beneficiary completed or is not entitled to a trial work period and his earnings average more than $140 per month.

(2) FORWARD FOLDER AND/OR CD EVIDENCE TO BDI

All instances where the beneficiary visits the DO for help in completing the questionnaire *and* association of the Form SSA–821(a) or Form SSA–821 with the case folder is required.

Folder is in the DO when the DO finds that there is no issue; e.g., (1) the beneficiary's earnings average $140 or less per month and it is clear his work is not comparable to that of unimpaired workers in his community engaged in similar occupations as their means of livelihood (§ 6411), *or* (2) the beneficiary has *not* completed his TWP or (3) earnings-postings represent sick, vacation or other special pay.

mailing of Form SSA–821(a), the beneficiary must be notified about the information which prompted the proposal before any suspension occurs.

If suspension seems proper but the beneficiary has not been given advance notice or an opportunity to submit rebuttal evidence, BDI will send the case folder to the DO without suspending benefits. The DO will be requested to contact the beneficiary, explain the purpose of the information being sought and have him complete the necessary forms (see §§ 6710 ff). Where the folder is to be sent to the SA, the DO should request suspension of benefits after complying with §§ 6707 and 6716. The due process requirements for notice and opportunity to submit rebuttal evidence are not satisfied just because, in the course of SSA's investigation, the beneficiary was informed of the *possibility* that information in SSA files might warrant a suspension (see § 6707).

6707. District Office Notice to Beneficiary of Proposed Suspension Action

(a) General

Before requesting BDI to suspend benefits (see § 6706) the DO should (1) inform the beneficiary (or payee) of the proposed suspension action, (2) provide him with a brief summary of the evidence on which the proposed suspension action is predicated, and (3) give the benfieciary a reasonable opportunity (e.g., 10 working days) to respond in writing if he desires. If the beneficiary desires to obtain additional evidence which he believes may be material in support of his claim to continued benefits and needs more time, he may be granted an additional period of time (e.g., 20-30 days) to present such evidence. The DO should establish controls and, depending on the individual case situation, follow up at the appropriate time.

The above notice will usually be given in person at the time the beneficiary provided the information that establishes a basis of a determination of cessation. When the information was not provided during a personal contact, the DO will telephone the beneficiary or contact him by mail. Documentation is required: a copy of the letter (see subsection (*b*) below) if a mail contact is necessary, or an RC when contact is in person or by telephone. Do not delay forwarding a folder when the beneficiary clearly understands the reasons for suspension and his right to submit rebuttal evidence, offers no objection to the proposed suspension, and the report on which the suspension is based was submitted by the beneficiary (or his representative payee, if he has one).

(b) Mail Contact With Beneficiary Necessary

Where the DO has evidence sufficient to recommend suspension (see subsection (*a*) above) and a mail contact is necessary, the letter (in addition to advising the beneficiary of the proposed suspension action and the reasons) should conclude with a paragraph along the following lines: "If you have any additional information you want us to consider, please let us know immediately, using the enclosed envelope. A reasonable amount of time will be granted, if necessary, for you to obtain and submit additional evidence. If we do not hear from you within 10 days, we will recommend that benefits be suspended." The DO will enclose a self addressed, postage-free return envelope for the beneficiary's response. When the beneficiary does not respond within 15 days or makes it known that he has no additional evidence to submit, request BDI to suspend benefits (see § 6706(*d*) above), attach Form SSA–529 (see § 6716), and forward folder to SA or BDI, as appropriate. (If the DO does not have folder, forward material to BDI.)

6708. Cessation of Disability

Cessation of disability will be found effective with the earliest month in which one of the following applies:

(a) Medical Recovery

In the month medical recovery is established by the medical evidence.

(b) SGA—Medical Recovery Not An Issue

If medical recovery is not an issue, cessation will be found effective as of the first month after 9 months of trial work in which the individual is able to engage in SGA. It is not necessary for the beneficiary to be engaging in SGA or still working in the month of cessation. For example, if an individual stopped working in the ninth month of his TWP for reasons not related to his impairment, cessation may still be found in the 10th month if his work activity during the completed TWP *clearly* demonstrated a continuing ability to engage in SGA. If the TWP does not apply (e.g., DWB, freeze only, no waiting period cases), cessation will be found effective as of the first month in which the individual engages in SGA, or if he previously completed 9 months of his TWP, as of the month he returns to work which is SGA.

6709. Termination of Benefits

Disability benefits are payable, and the period of disability continues, for the month in which the disability has ceased and for the two succeeding months. Thus the month of cessation of disability and the month of termination of benefits or of the period of disability are different. For example, a beneficiary (entitled to a TWP) could work for a period of 9 months with cessation in the 10th month, and receive benefits for the 10th, 11th and 12th months. Even if the cessation is based on reasons other than engaging in SGA (e.g., medical recovery), the beneficiary (and any auxiliary beneficiaries) is entitled to receive benefits for the month in which disability ceased plus two additional months.

COMPLETION OF CONTINUING DISABILITY FORMS

6710. Form SSA–454—(Report of Continuing Disability Interview)

(a) General

Form SSA–454 (Report of Continuing Disability Interview) has been designed to aid the interviewer in securing and reporting information about changes in and treatment of the beneficiary's condition, as well as the effect the impairment continues to have on his ability to perform SGA. The information obtained should describe what changes, if any, have occurred since the last interview in which this type of information was obtained. Space is provided on the Form SSA–454 to record the interview. It is a self-contained report of the interview. (See § 6749.)

If any section of the Form SSA–454 does not provide sufficient space to record the interview, a Report of Contact should be used as a continuation sheet.

The following describes each section in the form SSA–454.

(b) Section I—Medical Care and Treatment

This section is designed to elicit from the beneficiary a complete description of all medical care and treatment since the initial interview (or most recent CDI) description of the beneficiary's medical history was obtained. He should be asked to relate the information in his own terms and in chronological sequence.

The question at the top of this section should be checked, "No," only if the beneficiary has not contacted some medical source (hospital, clinic, laboratory, physician). If any medical source has seen, treated, examined, or "checked-up" on the beneficiary's condition, that source should be identified in the space provided. This identification should include (*a*) the full name, address, and, where possible, telephone number of the source, and (*b*) approximately how frequently the beneficiary was seen, with dates, if known, e.g., once a week since September 1971.

Additionally, a narrative description of the beneficiary's current treatment and/or limitations placed on him by the physician should be given.

EXAMPLE: "On the advice of his doctor, the beneficiary spends 1 hour each morning with his left hand and wrist in hot paraffin. Once a week Dr. Smith gives him a cortisone shot."

NOTE: Any period of home confinement since the last application or continuing disability interview should also be described. The beginning and ending date of each period of home confinement should be noted along with a description of the condition that caused the confinement.

(c) Section II—Progression of Condition

The information to be recorded in this section should describe the changes in the beneficiary's condition since the last interview in terms of symptoms, physical limitations, and activities. If there has been no change it is only necessary to check the "No" block at the top of this section. However, if there has been any change, a "Yes" check should be made and a full description recorded, e.g., increases or decreases in symptoms should be described in terms of the type of change (frequency, severity, precipitating factors) and the dates when the changes occurred.

(d) Section III—Current Condition

A description of how the beneficiary's condition currently interferes with his ability to work should be recorded in this section. (Where Form SSA–821 is obtained, this section need not be completed.)

EXAMPLE: "Beneficiary states that both of his hands are so weak, painful, and stiff that he is unable to pick up and hold the nails, or grasp and swing a hammer with strength. He also stated he cannot carry the bundles and rolls of materials that are required of a roofer, his sole occupation for the last 22 years."

(e) Section IV—Daily Activities

This section should describe, in specific terms, the activities of a typical day and the limitations,

special pay (e.g., sick pay, vacation pay, back pay, or bonus). Instead, record on an RC complete information identifying and explaining the payments. Complete item III of the SSA–881 and write in Remarks "Posted Earnings Do Not Represent Pay for Work," and forward with all material to BDI.

In cases where suspension is requested as in (*b*)(1) and (*c*)(1) above, request suspension by wire and complete item III of the SSA–881 including the date the action was taken. Forward all material with the case folder to the SA. If you do not have the case folder, request suspension by SSA–725, complete item III of the SSA–881A, and send all material with the SSA–725 to BDI.

6736. Special Continuing Disability Situations.—The following listing of special continuing disability situations (§§ 6736.1–6736.8) provides instructions which supplement and in some cases supersede those instructions in §§ 6732 and 6734.

6736.1 Disabled Individual Deceased.—Record the information in Item 1A on the SSA–881 showing the date of death. Send the material to BDI.

6736.2 Individual Is Hospitalized.—(*a*) *No work.*—If the individual is hospitalized and has done no work, complete Item 1B of the SSA–881 and return to BDI.

• (*b*) *Work less than 9 months.*—If the individual is hospitalized and the CD issue arose because of work activity and the individual has worked in less than 9 months of his TWP, complete Item 1B of the SSA–881A and write, "Currently hospitalized" in the Remarks section or complete Items 1B and 1D of the SSA–881. Return to BDI.

• (*c*) *Worked 9 or more months or not entitled to a TWP.*—If the individual is hospitalized and the CD issue arose because of work or he is not entitled to a TWP, a personal contact should be made except when (1) the individual is confined in a hospital or institution for the criminally insane, or (2) the hospital feels that the contact would be detrimental to the individual's health. In this situation, try to obtain the information from the employer or an interested party. Complete an SSA–821(s) and Item 11E of the SSA–831 or Item 11D of the SSA–881A. Insert in the remarks section of these forms, "Currently Hospitalized." Forward all material with the case folder to the State agency. If you do not have the case folder, send the material to BDI.

NOTE: Full development per § 6732 should be obtained if the person has been discharged, or is on a trial visit (e.g., convalescent status, parole, family care, foster care, community residence). Nursing homes, county homes, VA domiciliary centers, etc., are not hospitals in this context.

6736.3 Cases Involving Mental Illness.—When a disabled individual has been released from the hospital in the custody of another person, obtain the information required in § 6732 from the custodian. When the disabled individual has been released in his own custody, the DO may ask the hospital if it would be preferable to contact a relative or friend instead of the individual himself.

6736.4 Failure To Cooperate.—There may be instances where an individual does not furnish information about work activity, medical treatment, etc., or otherwise fails to cooperate with efforts of the DO to complete a continuing disability interview. When this situation arises, assume that the individual is unable rather than unwilling to cooperate since his failure to cooperate may be due to the nature of his impairment or a restriction resulting from the impairment or for other good cause. Consequently, all reasonable effort should be extended in every case requiring a continuing disability investigation.

When a beneficiary fails to comply with a written request for information, personal contact should be attempted. If the DO is unable to get in touch with the individual by telephone, a home visit should be made. In either event, an explanation that his failure to cooperate by a specific date (generally 2 weeks should be specified from the last contact, whether it be by personal interview, telephone, or when these are not possible by a letter) may result in the termination of his benefits will be transmitted to the beneficiary, either orally or in writing. If a mental condition is involved, it may be more prudent to contact relatives, friends, neighbors, or employers for assistance in obtaining the desired information. Sometimes members of the clergy are helpful. Where auxiliary benefits are being paid, the auxiliaries should be contacted, told of the need for cooperation on the part of the beneficiary and of the likelihood that all benefits may be terminated because of his failure to cooperate. When these efforts to obtain the beneficiary's cooperation are unsuccessful, request BDI to suspend all benefits (see § 6716).

It may occasionally be impractical for the DO to interview the individual within a reasonable

period; if the DO cannot make personal contact within 45 days after receipt, the request for a CDI should be returned to BDI with a report of contact explaining why a personal interview was not conducted. Where it appears likely that contact will be made shortly after the 45-day period, retain the file and proceed with the investigation (e.g., a cooperative individual agrees to met the DO representative at the contact station on the next visit which will fall on the 55th day). In the event a personal contact is not possible and the request is returned to BDI, any information obtained about the individual's activities or condition should accompany the file. During efforts to contact an individual, for example, the DO may receive information from relatives, employers, etc., which will enable BDI (or the SA) to make a determination or to suggest a specific type of development. All efforts to communicate with the individual or to have him cooperate, including any explanations given the individual of the effect of his refusal to cooperate, should be fully recorded on dated Reports of Contact. Copies of all correspondence should also be made a part of the file. The accuracy and completeness of the DO development is vital not only as an aid in any further pursuit of the existing issue but because this may serve as the evidence on which a determination as to continuance or cessation of disability may be made.

Upon completion of all necessary DO development and action, complete item III of the SSA–881A and write "failure to cooperate" in the remarks section, or complete Items 11D and III of the SSA–881, attach the RC and forward all material with case folder to the State agency. If the case folder was not sent to the DO, send all the material to BDI for association with the folder.

6736.5 Whereabouts Unknown.—When the beneficiary cannot be located at his last known address and his new address is not readily ascertained, e.g., mail is returned undeliverable, the DO should contact the postmaster with Form SSA–7001 (Postal Card Requesting Address From Postmaster) in an attempt to ascertain the beneficiary's current address. If this effort is unproductive, a personal visit should be made to the beneficiary's last known address. Individual's in the immediate neighborhood—landlord, merchants, neighbors—may have knowledge of the beneficiary's whereabouts. Where auxiliary benefits are being paid, the auxiliaries should be contacted.

Occasionally, individuals with histories of institutionalization for mental or emotional problems can be located through those institutions, even in those situations where the institution had previously given notice of the individual's elopement. Where there are wage postings in the recent past, the beneficiary may be located through the employer (identified by BDPA upon request).

All efforts made to locate the individual should be fully recorded on dated Reports of Contact. If, after exhausting all reasonable efforts, the individual still cannot be located, complete items 11D and III of the SSA–881 or item III of the SSA–831A and write "whereabouts unknown" in the remarks section, attach the Reports of Contact and forward the material and/or folder to BDI without requesting suspension. Upon receipt, BDI will take whatever further action may be appropriate, including suspension of benefits.

6736.6 Report of Disability Interview Limited at Initial Application.—In some cases BDI will request the DO to obtain information about an individual's work history because such evidence is not in file, e.g., the initial report of disability interview was limited because the individual was hospitalized, house-confined, etc. This information will be requested by a check in block 6. a. under remarks on the SSA–881, or by narrative remarks and should be provided in the Vocational Description section of form SSA–401 in addition to the usual CDI development.

6736.7 Beneficiary Wishes To Return Check(s) or Requests Suspension of Benefits.—When a beneficiary wishes to return a check or requests suspension of benefits to which he is entitled (e.g., an individual with an impairment for which medical recovery is not expected and while entitled to a TWP returns to work), find out why he requests such action. If it is clear that he nevertheless is entitled, explain to him that he is entitled to the check. If, after the explanation, he still wishes to return the check or have his benefits suspended, comply with his request. (See §§ 5710 ff. and 6716.) In any case, the DO should initiate a continuing disability investigation. (See §§ 6730 ff.)

6736.8 Participation in Vocational Rehabilitation.—In each CDI the DO will ascertain whether the beneficiary is known to a State Vocational Rehabilitation Agency. In those cases where the beneficiary is being considered for or receiving services from or through the agency, the name and address of the counsel or office servicing him, as

6746. Form SSA–454(a) (Social Security Disability Beneficiary Report) (See § 6705.1)

Refer to
Social Security Number

Date

When your disability payments began, you were notified by the Social Security Administration that your condition might improve and your claim was scheduled for a future review. The Social Security Administration has requested us to develop current evidence as to whether your condition still prevents you from working.

To help us determine whether you are still entitled to disability benefits, please answer the questions on the next three pages, sign your name at the bottom, and return the form within ten days using the enclosed envelope which requires no postage.

If at any time medical evidence shows that your condition has improved so much that you are no longer disabled, you will still receive benefits for a 3-month period of adjustment. This period includes the month in which your condition improves and 2 additional months. Benefits will then be stopped.

If you have questions or need help in filling out the questionnaire, please telephone or visit any social security office. You can find the address in the telephone directory under "Social Security Administration," or ask at your local post office. If you visit the social security office, please bring this letter with you.

Sincerely yours,

SSA-454a (5-72)

BEST COPY AVAILABLE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF DISABILITY INSURANCE

Form Approved.
OMB No. 72-R0310

SOCIAL SECURITY DISABILITY BENEFICIARY REPORT

I understand that this report will be used to verify my continuing eligibility to benefits and should it be determined that I am no longer entitled, benefits will be terminated.

INSTRUCTIONS FOR COMPLETING THE FORM

Answer each question as fully as possible.

If any question does not apply to you, write "none" in the space provided.

If you need more space to answer a question, use the back of this form or a separate sheet of paper. If you use a separate sheet of paper, please be sure to put your social security claim number on it.

Answer all parts of the following questions:

1. (a) Do you feel your medical condition has improved so that you are able to return to work?

☐ Yes ☐ No If No, explain below.

(b) Has your doctor told you that you are able to return to work?

☐ He said Yes If the answer is yes, when?_____ *(give date)*

☐ He said No ☐ He did not say

(c) Has he placed any significant restrictions on the kind of work you may do or how many hours a day you may work?

☐ No ☐ Yes If Yes, explain below

Describe below in your own words your present condition: be sure to list what you believe you are unable to do in terms of lifting, bending, pushing, etc., that interferes with your working again.

FORM SSA-454(a) (5-72)

2. Give name, address and telephone number of your physician(s) and of the hospital or clinic where you have received treatment for the condition that prevented you from working.

(a) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER
(b) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER
(c) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER

3. Have you worked in the past 12 months?

☐ No ☐ Yes *If "Yes," be sure to complete all of the following items.*

(a) NAME, ADDRESS AND TELEPHONE NUMBER OF EMPLOYER			(b) KIND OF WORK DONE	
(c) WHEN STARTED *(Date)*	(d) AVERAGE HOURS WORKED		(e) AVG. GROSS EARNINGS *(Before payroll deduct.)*	
	PER DAY	PER WEEK	PER DAY	PER WEEK

(f) ARE YOU STILL WORKING?

☐ Yes ☐ No *If "No," explain below why and give date you stopped working.*

4. (a) Are you receiving services from or through the State vocational rehabilitation agency?

☐ No ☐ Yes *If "Yes," answer question (b)*

(b) Name and address of servicing rehabilitation office and counselor.

5. Remarks: Enter here any additional information that you believe is important and will assist in the review of your continuing entitlement to social security disability benefits. *(If you need more space, use a separate sheet of paper. Also, if you wish, you may attach any evidence that shows your current condition.)*

6. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review your entitlement for continuing disability benefits, any medical records or other information about your disability?

☐ Yes ☐ No

I certify that the above statements are true, correct, and complete to the best of my knowledge. I know that anyone who fraudulently conceals or fails to report a disqualifying event or who makes a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act could be subject to a fine or imprisonment or both.

SIGN YOUR NAME AS YOU USUALLY WRITE IT	DATE	PHONE NUMBER
▶		

If the address shown on page one of this form is incorrect or incomplete please enter your present address below

NUMBER AND STREET, APARTMENT NO., P.O. BOX, OR RURAL ROUTE

CITY	STATE	ZIP CODE

6747. Form SSA–821(a) (Report of Work Activity—Continuing Disability)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21241

BUREAU OF DISABILITY INSURANCE

REFER TO: DI:CE

Date

Social Security Number

Our records show:
☐ That you have worked since _____.
☐ $ _____ has been reported to your social security record for the period beginning _____.

As you were notified, your benefits may be stopped if you are again able to do substantial gainful work. Your medical condition may have improved enough for you to do this. But even if your condition has not improved your work may show that you now have the ability to do substantial gainful work.

The amount of your earnings is important in determining whether you are able to engage in substantial gainful work. The general rule is that if your earnings average more than $140 a month (your pay before payroll deductions), you are performing substantial gainful work. Unless you submit information that establishes that you do not have the ability to engage in substantial gainful work, a determination will be made that you are no longer under a disability and your benefits will be terminated.

Please answer the questions on the next three pages. Sign your name at the bottom of the last page. In order to prevent possible overpayments of benefits to you return the form promptly. Please use the postage-free envelope enclosed. Unless this form is returned within the next 10 days your benefits may be suspended based on the information already in your file. If you need more time please let us know.

If you have any questions, or need help in filling out the form, please telephone or visit any social security office. The people there will be happy to help you. You can find the telephone number and address in the telephone directory listed under "Social Security Administration," or you can ask at your local post office. If you visit the social security office, please take this letter with you.

Sincerely yours,

C. C. Hall
Assistant Director

Enclosure:
Pre-Addressed Envelope

SSA-L821(a) (6-72)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF DISABILITY INSURANCE

Form Approved.
OMB No. 72-R0861

REPORT OF WORK ACTIVITY–CONTINUING DISABILITY

I understand that this report will be used to determine whether to continue or to stop my disability cash benefits and that evidence of continuing entitlement with respect to all matters must be submitted promptly, otherwise my benefits may be suspended based on evidence already in file. Also, I understand that if the work as I describe it does not establish that I am unable to engage in substantial gainful work activity, I will be found to be no longer under a disability and my benefits will be terminated.

1. Have you worked *at any time* since the date shown in the first paragraph of the preceding page?

☐ Yes. If "yes", be sure to answer *all* the following questions. If any question does not apply to you, please explain in the space for remarks (number 10 on page 4).

NOTE:

☐ No. If "no", skip questions 2 to 8 and go to question 9 page 4. (If earnings have been reported to your social security record - see amount entered in the first paragraph of the preceding page - but you have not worked, please explain in the space for remarks - number 10 on page 4 For example state if the amount reported represents sick pay, vacation pay, etc.) *If you cannot account for the reported earnings, please telephone or visit your social security office.*

2. Please furnish the information requested about your present or most recent employer. Use paragraph 7 on page 3 to list any other employers you worked for since the date shown in the first paragraph of the preceding page.

NAME OF EMPLOYER

EMPLOYER'S ADDRESS

DATE YOU STARTED WORKING FOR THIS EMPLOYER	MONTH	DAY	YEAR

3. My total earnings (before payroll deductions) are

Per Week $ _____ or Per Month $ _____ or Per Hour $ _____ —

I am working _____ hours per week or _____ per day.

4. Since you started working for this employer, have there been any months in which your total monthly earnings (before any deductions) were $50 or less?
☐ No ☐ Yes *If "yes", list each month and the amount earned that month.*

5. Are you still working for this employer? ☐ Yes ☐ No

If no, when did you stop working for this employer?	MONTH	DAY	YEAR

Explain why you stopped working

FORM SSA-821(a) (6-72) – 2 –

6.
A. What is your Job Title?

B. Briefly describe your duties

7. If you have worked for other employers since the date shown in the letter on top of this form please furnish the following information for each employer:

(a) Name of employer	(b) Address of employer
(c) Dates of employment	(d) Earnings per month before deductions

(e) Any months where you earned $50 or less

(Use paragraph 10 on page 4 if you need additional space for describing work for other employers.)

8. (a) Has your doctor told you to limit your activities in any way?

☐ No ☐ Yes ☐ Did not say

(b) *If "Yes", give the name of the doctor and what he told you about limiting your activities.*

(c) When did your doctor tell you this?

(d) Does your impairment affect your ability to do your work?

☐ No ☐ Yes *(If yes, explain how)*

9. Are you receiving services from or through the State vocational rehabilitation agency?

☐ No ☐ Yes *If "Yes," give*

Name and address of servicing rehabilitation office and counselor.

10. Remarks: Use the space below for explanation of question number one. Also, enter here any additional information that you believe is important and will assist in the review of your continuing entitlement to social security disability benefits. *(If you need more space, use a separate sheet of paper. Also, if you wish, you may attach any evidence that shows your current condition.)*

11. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review your entitlement for continuing disability benefits, any medical records or other information about your disability? ☐ Yes ☐ No

I certify that the above statements are true, correct, and complete to the best of my knowledge. I know that anyone who fraudulently conceals or fails to report a disqualifying event or who makes a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act could be subject to a fine or imprisonment or both.

SIGN YOUR NAME AS YOU USUALLY WRITE IT ➡	DATE	PHONE NUMBER

If the address shown on page one of this form is incorrect or incomplete, please enter your present address below

NUMBER AND STREET, APT. NO., P.O. BOX OR RURAL ROUTE

CITY	STATE	ZIP CODE

If we need more information after you send this form back to us, someone from the social security office or from the State agency that works with us in making disability decisions will get in touch with you.

570-081 O - 75 - 8

6748. Form SSA–821 (Work Activity Report)

Form Approved:
Budget Bureau No. 72-R0529

WORK ACTIVITY REPORT

Complete for all initial cases with work activity after onset, and in continuing disability cases with work activity. (See CM 6400H, 5185H)

SOCIAL SECURITY NUMBER | DATE

OFFICE

CASE EXAMINER'S NAME

NAME AND SOCIAL SECURITY NUMBER OF DISABLED PERSON (If other than W/E's)

PERSON CONTACTED ☐ CLAIMANT ☐ OTHER (If other, show name, address and relationship to claimant)

INTERVIEWER'S SIGNATURE ☐ CR ☐ FR ☐ OTHER (Specify)

PART I – WORK AS AN EMPLOYEE

	DATES WORKED: STARTED (month, day, year)	DATES WORKED: ENDED (month, day, year)	AVERAGE HOURS PER DAY	AVERAGE DAYS PER WEEK
A. WORK ATTENDANCE	/ /	/ /		
	/ /	/ /		
	/ /	/ /		

B. EARNINGS		PER HOUR	PER DAY	PER MONTH		PER HOUR	PER DAY	PER MONTH
	STARTING WAGES				ENDING WAGES			
	STARTING WAGES				ENDING WAGES			
	STARTING WAGES				ENDING WAGES			

TIPS

"IN KIND" (explain)

OTHER (explain)

C. EMPLOYER — NAME, ADDRESS, PHONE NUMBER OF EMPLOYER

D. HOW JOB WAS OBTAINED

E. WORK STOPPAGE — CLAIMANT STOPPED WORKING ☐ YES ☐ NO (If "Yes," give date and explain reason for work stoppage)

CHECK IF ONE OF THE FOLLOWING APPLIES (If one of the items is checked, do not complete the remainder of Part I)

1. ☐ Claimant worked 3 months or less and stopped working because of impairment, or removal of special conditions.
2. ☐ Claimant's earnings as an employee do not exceed $90 per month.
3. ☐ Claimant works in sheltered employment (e.g., sheltered workshop, VA domiciliary) and his earnings do not exceed $140 per month.
4. ☐ Claimant's earnings as an employee exceed $200 per month and there is no evidence of "substantial" subsidy.
5. ☐ In initial case, claimant returned to a job that is described in Section VI (Principal Job) on SSA-401 and there is no change in duties, or special conditions.

FORM SSA-821 (...)

COMPLETE IF NO BLOCK (1 thru 5) ON PRECEEDING PAGE IS CHECKED | JOB TITLE

F. JOB DUTIES: (List duties claimant performs in a typical day, giving percentage of day spent on each duty)

G. SUBSIDY: (Check if any of these items apply. If any of the items are checked, develop subsidy with the employer per (CM 6421)

- ☐ Childhood disability case
- ☐ Mental impairment involved
- ☐ Sheltered employment
- ☐ An allegation is made that the claimant does not fully earn his pay
- ☐ The claimant's job duties differ from those of regular employees
- ☐ The claimant's hours of work differ from those of regular employees
- ☐ The amount of assistance received by the claimant differs from that of regular employees
- ☐ The claimant's work differs in quality or quantity from that of regular employees
- ☐ The claimant receives special considerations in the performance of his work
- ☐ Other indications of subsidy (explain)
- ☐ None

H. COMPARABILITY (CM 6422)

Do the claimant's earnings average between $90–$140 per month in non-sheltered employment after deducting any subsidy? ☐ Yes ☐ No

If "Yes," is the claimant's work comparable to that of unimpaired persons in the community engaged in similar occupations as their means of livelihood, or is the claimant's work reasonably worth over $140 a month according to pay scales in his community. Explain answer in sufficient detail.

REMARKS (Record any unusual aspects of case)

PART II – COMPLETE IF CLAIMANT SELF-EMPLOYED OR WORKS IN A FAMILY OR CLOSE CORPORATION (§§ 5185H)

TYPE OF WORK ☐ NON-FARM SELF-EMPLOYED ☐ FARM SELF-EMPLOYED ☐ CORPORATION OFFICER

NON-FARM BUSINESS	NO. OF EMPLOYEES (Farm and non-farm)	FARM	NO. OF ACRES	TYPE OF CROPS	TYPE AND SIZE OF FLOCKS AND HERDS
☐ SOLE OWNER	FULL TIME	☐ SOLE OWNER	CULTIVATED		
☐ PARTNER	PART TIME	☐ PARTNER	PASTURE		
☐ CORPORATION OFFICER		☐ TENANT	FALLOW		

WORK ATTENDANCE (Dates Worked)		SELF-EMPLOYMENT INCOME		CORPORATION OFFICER	
STARTED (Month, day, year)	ENDED (Month, day, year)	GROSS THIS YEAR	$	SALARY THIS YEAR	$
/ /	/ /	NET THIS YEAR	$	OTHER INCOME THIS YEAR	$
/ /	/ /	GROSS LAST YEAR	$	SALARY LAST YEAR	$
/ /	/ /	NET LAST YEAR	$	OTHER INCOME LAST YEAR	$

CHECK IF ONE OF THE FOLLOWING APPLY *(If one of the items is checked, do not complete remainder of form)*

☐ Claimant worked 3 months or less and stopped because of impairment, or removal of special conditions

☐ In initial case, claimant returned to a job that is described in Section VI (Principal Job) on a SSA-401 and there is no change in duties, or special conditions.

☐ Claimant is a farm landlord AND (1) he is materially participating in the farm operations, AND (2) there has been no significant reduction in his activities, AND (3) his earnings average over $140 per month.

A. CHANGES IN OPERATION SINCE ONSET (Explain and give date such changes occurred for each checked item.)

HAVE THERE BEEN ANY CHANGES IN ANY OF THE FOLLOWING SINCE ONSET?

NON-FARM BUSINESS			FARM		
Volume of Business	☐ Yes	☐ No	Size of Farm Operations	☐ Yes	☐ No
Inventory	☐ Yes	☐ No	Acres under Cultivation	☐ Yes	☐ No
Income Gross	☐ Yes	☐ No	Size of Herds or Flocks	☐ Yes	☐ No
Net	☐ Yes	☐ No			
Number of Employees	☐ Yes	☐ No	Income Gross	☐ Yes	☐ No
Hours Business Open	☐ Yes	☐ No	Net	☐ Yes	☐ No
			Number of Employees	☐ Yes	☐ No

REMARKS

B. MANAGEMENT DECISIONS (Explain and describe management services of claimant and others)

Does claimant make management decisions? ☐ Yes ☐ No

How much time does claimant devote to management services?

Are management services rendered by others? ☐ Yes ☐ No

(If "Yes," by whom, for how much time, and describe such services)

PART II (Continued) – Describe any other services rendered by claimant in operation of business and show time and percentage of time spent in each activity.

C. OTHER SERVICES

Explain any changes since onset and give date of occurrence.

D. ASSISTANCE RECEIVED

Explain nature of assistance ●

Why was assistance given ●

How many assistants ●

How much time does assistant(s) devote to farm or business ●

Describe duties of assistants ●

Was payment made for this assistance
If "Yes," how much and to whom ●

Is there any relationship between claimant and assistants ●

Estimate of value of unpaid assistance
(use prevailing local wage rates) ●

E. OTHER FACTORS (Complete in all cases)

How does business compare with similar ones in the same area

Size ●

Type ●

Hours of business or farm operation ●

REMARKS *(Record any unusual aspects of case)*

6749. Form SSA–454 (Report of Continuing Disability Interview)

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
Budget Bureau No. 72–R0193

REPORT OF CONTINUING DISABILITY INTERVIEW
(Write Legibly)

OFFICE | DATE

CONTACT MADE: ☐ IN PERSON ☐ TELEPHONE

PLACE OF CONTACT: ☐ DO ☐ CS ☐ HOME ☐ OTHER

WAGE EARNER'S NAME | ACCOUNT NUMBER | CLAIMANT'S NAME (when claimant is not wage earner)

PERSON(S) CONTACTED: ☐ CLAIMANT ☐ OTHER *(If other, show name, address and relationship to claimant)*

INTERVIEWER'S SIGNATURE ☐ CR ☐ FR ☐ OTHER

I. MEDICAL CARE AND TREATMENT

Has the claimant been examined, treated, or hospitalized since the last application or last continuing disability investigation? ☐ YES ☐ NO *(If "Yes," complete the rest of item.)*

Identify all sources that have treated or examined the claimant since the last application or continuing disability investigation, whichever is later.

NAME, ADDRESS, AND PHONE OF PHYSICIAN, HOSPITAL OR CLINIC	DATES WHEN CLAIMANT SEEN

Describe treatment and limitations placed by the claimant's physician.

Describe periods of home confinement
- Dates confined
- Causative condition

II. PROGRESSION OF CONDITION

Have there been any changes in symptoms, physical limitations, or activities since the last interview? ☐ YES ☐ NO

If yes, describe fully all changes in condition (with dates) since last interview.

FORM SSA–454 (6-69)

(If Additional Space is Needed, Use Form OAC–5002.)

III. CURRENT CONDITION

Describe in the words of the claimant how his condition currently interferes with his ability to work.

IV. DAILY ACTIVITIES

Describe only the activities of a typical day that have changed since they were last reported.
- Physical
- Mental
- Contact with others

Describe assistance required in caring for personal needs.

V. EFFORTS TO WORK – Has the claimant performed any work since the established onset date that is not described in the file? ☐ YES ☐ NO *(If "Yes", complete an OA-D831 for each job)*

VI. VOCATIONAL REHABILITATION – Is the beneficiary being considered for or receiving services from or through the State Vocational Rehabilitation Agency?
☐ YES ☐ NO *(If "Yes," record (1) the name and address of the counselor and servicing office, (2) the type of services being received.)*

VII. OBSERVATIONS – Are the alleged impairment(s) observable? ☐ YES ☐ NO ☐ TELEPHONE CONTACT

Sight	☐ Yes	☐ No	Hearing	☐ Yes	☐ No	Comprehending	☐ Yes	☐ No
Reading	☐ Yes	☐ No	Use of hands and arms	☐ Yes	☐ No	Breathing	☐ Yes	☐ No
Responding	☐ Yes	☐ No	Writing	☐ Yes	☐ No	Sitting	☐ Yes	☐ No
			Speaking	☐ Yes	☐ No	Walking	☐ Yes	☐ No
						Other	☐ Yes	☐ No

Check each item to the left to indicate whether or not any difficulty was observed.

Describe fully
- General appearance
- Behavior
- Outward attitude
- Circumstances surrounding the interview
- All "Yes" checked items above.

(If Additional Space is Needed, Use Form OAC-5002.)

T6260. DISTRICT OFFICE RESOLUTION OF WORK ISSUES

(a) DO Determines Work is SGA

District offices will resolve work issues where the question is solely whether or not the individual is or was engaging in substantial gainful activity (SGA). Where the work is determined to be SGA, prepare the SSA-831 (Disability Determination and Transmittal) in initial determinations of denial unless a visual impairment is alleged (§T6265(a)(4)) and in reconsideration of initial determinations. In continuing disability determinations (including reconsideration of cessation), complete the SSA-833 (Cessation or Continuance Disability Determination and Transmittal).

(b) DO Determines Work is Not SGA

If the DO determines that the work activity is not SGA, record this determination on an SSA-553 (Special Determination) and send the case to the SA or BDI in accordance with §T6265 and §T6266.

(c) Development Requests

If the DO has a request from the SA or BDI for development of a work issue but does not have the file, complete the development and forward it to the requestor. An SSA-831 or SSA-833 should not be completed without the folder; therefore, when the folder is not in the DO, prepare an SSA-553 and forward it with the development.

T6261. STATE AGENCY RESPONSIBILITIES

The SA will adjudicate medical-vocational issues in initial and reconsideration level cases and continuing disability investigations and make work-comparability decisions for the special definition of blindness for individuals age 55 and over. If in the course of its development of a case, the SA learns that the claimant or beneficiary is working, it will send the file to the DO for development and resolution of the work issue, unless there is sufficient information for a decision on other grounds (e.g., a medical-vocational denial, closed period of disability, or the claimant is entitled to a TWP). Generally, no medical or vocational development will be requested pending resolution of the work issue, and any evidence that had been requested earlier will be associated with the folder.

T6262. BDI RESPONSIBILITIES

(a) Claims Review

BDI will review those cases with a category checked in item 2 of the flag SSA-2822 (§T6276, Exhibit 2) and a sample of those cases which do not have a block checked in item 2. The DO copy of the approved SSA-831 or SSA-833 will be released, and the notification mailed to the claimant. If the DO decision is not approved, the file will either be sent to the DO for additional work development or to the SA for a medical-vocational determination. BDI will advise the DO why any DO SGA decision is not approved.

(b) Investigation of Work After Entitlement

BDI will screen and process all voluntary reports of work received by BDI (see §6705(a)), all the work activity alerts and job 455 printouts (see §§6705.2 and 6743), and maintain the TWP and medical diaries (see §6703ff).

BDI is responsible for initialing, controlling, and taking followup action for the direct mail development of work issues with disability beneficiaries. It will review the completed questionnaires, SSA-821(a) (Report of Work Activity - Continuing Disability) for completeness, and to determine if an unresolved question of continuing eligibility exists and initiate further development where indicated. Complex work issues and cases excluded from the direct mail procedures will be sent directly to the DO for investigation.

If BDI's review of the completed SSA-821(a) establishes that the evidence in file is sufficient to make a determination of continuance or cessation of disability, it will prepare the determination and notify the beneficiary. If BDI's review indicates that further development is needed, it will refer the case to the district office for processing.

T6263. DISTRICT OFFICE RESPONSIBILITIES IN CONTINUING DISABILITY INVESTIGATIONS

The DO is responsible for developing work activity in all continuing disability investigations referred by the SA or BDI, as well as in all cases in which the beneficiary reports to the DO that he has returned to work and the report raises a continuing disability issue. Where work activity is being investigated as a result of a SA or BDI referral (i.e., the DO has the case folder) it will be necessary for the DO to prepare or update the OAAD-299 (Trial Work Period Tally Sheet). (See § T6276, Exhibit 4.) This form should be placed inside the folder on the left under all other material. The DO reviewer should place an "X" in each month that the WE, child, or self-employed person, while entitled to benefits, performed "services" (i.e., work activity in employment in a month performed for remuneration or gain amounting

to more than $50.00 either in cash or in kind. Services in self-employment should only be counted when net earnings in a calendar month are more than $50.00 or the self-employed persons spends more than 15 hours in that month in work activity). Upon completion of the entries, the DO reviewer will sign and date the form and indicate the last month and year for which he has made an entry. Where the beneficiary has completed his TWP (see §6703ff) the DO will secure an SSA-821 (Work Activity Report), and SSA-454 (Report of Continuing Disability Interview), and develop the work activity issue fully per §6705.2 and 6705.3.

In addition, the DO is responsible for assuring that the beneficiary understands that the investigation may result in his benefits being stopped and that he has an opportunity to submit any evidence that may have a bearing on the decision. When appropriate, the DO will explain why it appears that the work the beneficiary is doing is indicative of SGA. The DO will fully document the file with respect to these actions, prepare a determination using an SSA-833 (Cessation or Continuance Disability Determination and Transmittal), and assign the appropriate notification. The rationale will be given on SSA-834 (Continuation Sheet for Disability Determination). Cases with sensitive or complex issues are to be flagged (§T6272). In any determination of cessation, consider the beneficiary's right to due process (advance notice) before benefits are stopped (§§6705.3, 6706 and T6273).

T6264. SUBSEQUENT NOTICE OF WORK ACTIVITY AFTER NEW CLAIM LEAVES THE DISTRICT OFFICE

(a) Claim Sent to State Agency

When the DO receives notice of work activity after the case is sent to the SA, it should first notify the SA by telephone and then obtain enough information from the claimant to determine whether he engaged in SGA according to the criteria in §6403. If the claimant has resumed working and still wishes to pursue his claim, obtain a work activity report (SSA-821) per §6445. If the evidence confirms that the claimant engaged in SGA, the DO should request the folder from the SA by telephone in order to complete the SSA-831 and forward the claim to BDI. The SA will return the folder unless it can readily make a medical-vocational denial, or the DO can furnish the SA with sufficient information about the work to establish a closed period or TWP. If the conclusion is that the claimant did not engage in SGA, an SSA-553 (Special Determination) should be prepared and forwarded to the SA with the development.

(b) Claim forwarded to BDI

If the DO receives its copy of the SSA-831 showing that the SA allowed the claim and the file was sent to BDI, do not request the folder but notify BDI immediately by teletype that the claimant returned to work and forward to BDI development and a special determination (SSA-553) showing that the claimant did or did not engage in SGA.

T6265. CASES TO BE SENT TO STATE AGENCIES

The following cases will be sent to the SA unless they are otherwise excluded from SA jurisdiction (§§6252-6254, T6266). Prepare an SSA-553 concerning the SGA issue (§T6268).

(a) Initial Disability Claim (Complete Items 1 through 23 of the SSA-831 (Disability Determination and Transmittal) (§6272)).

(1) Work Activity Not SGA

The claimant is engaging in work activity at the time of filing but the DO concludes that the work activity is not SGA.

(2) SGA Ceased

The claimant was engaging in SGA after alleged onset but ceased SGA. The reason for discontinuance or reduction of work should be developed (§6452).

(3) Current Work is SGA But a Closed Period of Disability Is Possible

A closed period of disability may be found if the claimant did not engage in SGA due to an impairment during the 12-month period before he returned to work.

(4) Alleged Visual Impairment

A DIB or Freeze claimant of any age, or a CDB claimant age 55 or over is engaging in SGA but alleges a visual impairment, and disability was not previously established. If disability was previously established, see §6252.6.

(b) Initial Continuing Disability Cases (Complete items 1 through 6 of the SSA-833)

The claimant is not engaging in SGA, or the work is protected by the TWP and there is an issue of medical recovery, as indicated by:

(1) Medical Diaried Case (see item 33 - if blank see item 42 - of most recent SSA-831, or item 25 of SSA-833 on left side of folder)

(A) The beneficiary returned to work; or

(B) the diary has matured or will mature within 2 months.

(2) All Cases, Diaried or Non-Diaried

(A) The individual applies to become his own payee; or

(B) New Medical evidence or allegation indicates medical improvement.

Whenever an initial continuing disability case is sent to the SA for resolution of a medical issue, obtain an SSA-827b for the SA's use in current medical development. In addition, secure an SSA-821 and/or SSA-454 as needed (§6732) but do not prepare an SSA-831 or SSA-881A. Instead, prepare an RC showing the reason under (1) or (2) above that a medical issue exists and notify the beneficiary that his file is being sent to the SA for review.

(c) Reconsideration Cases

Route to the SA any initial denial in which the DO on reconsideration finds that the claimant is no longer engaging in SGA.

Route to the SA any SGA cessation in which the DO on reconsideration finds that the claimant is no longer engaging in SGA and there is a medical issue as evidenced by a medical reexamination diary date or other indications of possible medical recovery (§6732). Where required, update the medical and vocational evidence before forwarding the case (§6582).

Note: If the basis for the initial denial or the cessation was SGA and the reconsideration evidence now shows that the claimant or beneficiary was not engaging in SGA, carefully set forth on the SSA-553 the reasons why the prior determination is being reversed. These cases may be identified by "Reg-Basis Code" "N1-1532" or "N2-1532" (DIB or CDB case) or "N1-1504" or "N2-1504" (DWB case) on SSA-831, or by the rationale on the SSA-834.

(d) Reopenings

(1) Additional evidence shows that the prior SGA denial was improper.

(2) Additional evidence shows that a cessation based on SGA was improper and there is a matured medical reexamination diary or indication of medical improvement.

T6266. CASES TO BE SENT TO BDI

The following cases will be sent to BDI after the DO resolves all work issues, gives advance notice if required under §T6273, and prepares an SGA determination.

(a) Initial Disability Claims

The DO concludes that the claimant is engaging in SGA. (Closed period cannot be established §T6265(a)(3)--visual impairment not alleged §T6265(a)(4)). Complete the SSA-831 (§T6269).

(b) Initial Continuing Disability Cases

The SA or BDI has requested DO development of a work issue or a CDI is initiated per §6730(b) and the DO determines that the beneficiary:

(1) is engaging in SGA and the TWP has expired (or the beneficiary is not entitled to TWP - see §6703.2); or

(2) is not engaging in SGA and there is no medical issue (§T6265(b)). Complete the SSA-833 and SSA-834 (§T6271); or

(3) has a trial work period in progress.

(c) Reconsideration Cases

(1) Claimant engaging in SGA. Complete an SSA-831 (§T6270) or a SSA-833 (§T6271). If the DO is unable to obtain the folder, a determination should not be made on SSA-831. However, all SGA development should be completed and sent with the Reconsideration request and a Special Determination (SSA-553) to BDI, using Part 3, Block 1.B. of SSA-1415.

Note: If the initial denial or cessation was on the basis of SGA, the determination should be completed by a claims representative or other authorized person other than the one who completed the initial determination.

(2) If disability was ceased on the basis of SGA as shown by the rationale on the SSA-834, but the reconsideration evidence shows that the beneficiary was not engaging in SGA and there is no matured medical reexamination diary or indication of medical improvement, complete an SSA-833 (§T6271).

(d) Reopening

(1) Initial SA allowance-subsequent evidence shows claimant engaging in SGA.

Evidence shows that the claimant was engaging in SGA before expiration of the waiting period or prior to the date of award (§6736.9). If the DO has the folder it will determine if reopening and revising the prior determination is proper under the rules of administrative finality (§7000ff). Consider the beneficiary's right to due process (advance notice) before benefits are stopped based on the revised SSA-831, §T6270, T6723.

(2) Additional evidence shows that a cessation based on SGA was improper and there is no matured medical diary or admission of medical recovery. Prepare a determination of continuance on SSA-833 and SSA-834 (§T6271).

T6267. CONSIDERATIONS IN RESOLVING WORK ISSUES

An SGA denial or cessation must be based on evidence establishing that the work activity demonstrates a continuing ability to engage in SGA, considering the hours, earnings, and duration of the work. Total monthly earnings at an SGA level generally are indicative of an ability to engage in SGA. However, if it appears that the sustained work requirements are incompatible with the individual's physical or mental limitations due to his impairment, the DO should be alert to the possibility of an unsuccessful work attempt. Case experience has shown that where an employer provides "made" work or special conditions, or a self-employed person receives unpaid assistance from family members or others, the value of the individual's services may be substantially less than the remuneration. In those circumstances, and the situations listed below, information about the job duties, hours, responsibilities, and other factors relating to the value of the services is necessary to resolve the work issue:

(a) Childhood disability;

(b) Mental impairment;

(c) Employment in a therapeutic program;

(d) Allegation that work is "made" work or that all or a portion of pay is a subsidy;

(e) Self-employment on a family farm or in a family business;

(f) Employment in a sheltered workshop or other institutional program;

(g) Alleged unpaid assistance from family members or others;

(h) Self-employment in which it is alleged that significant services were not rendered; and

(i) Any other situation in which the work requirements are apparently incompatible with the individual's physical or mental limitations.

The guides in §6400ff will apply in developing and resolving work issues.

T6268. PREPARATION OF THE SSA-553 (SPECIAL DETERMINATION)

When a case is transmitted to the SA in accordance with §T6265 or to BDI in accordance with §T6264(b) or §T6266(c)(1) prepare an SSA-553 as needed. Set out your findings and conclusion that the work activity being performed by the claimant does not constitute SGA. If the earnings exceed $140 a month, the determination should show to what extent the work is subsidized, the claimant receives unpaid assistance. or he incurs impairment related expenses. Cite appropriateclaims manual references from § 6400 ff. to support the determination.

T6269. COMPLETION OF THE SSA-831--DENIAL OF INITIAL TITLE II DISABILITY CLAIM (FOR TITLE XVI CASES, SEE §A6278).

When the conditions in §T6266(a) are met, the DO will fully prepare the SSA-831. Complete Items 1 through 23 in accordance with §6272 and the additional items indicated below:

Item 26 - Check this block when the insured status (DIB case) or prescribed period (DWB case) requirement is last met prior to the date of the current determination. Enter the date the insured status or prescribed period requirement is last met.

Check this block in a CDB case (where there was no prior CDB entitlement) if the claimant engaged in SGA before he attained age 22. Enter the date the claimant attained age 22. In a CDB reentitlement claim, check this block when the reentitlement period has expired. Enter the last day of the reentitlement period.

Item 27 - Check this block when the insured status (DIB case) or prescribed period (DWB case) requirement continues to be met through the date of the current determination.

Check this block in a CDB case (where there was no prior CDB entitlement) if the claimant began engaging in SGA after he attained age 22. In a CDB reentitlement claim, check this block if the claimant began engaging in SGA after the end of the reentitlement period.

Item 29 - Enter "None established."

Item 30 - Enter the code letter shown before the checked block from item 6 of the SSA-16 or item 7 of the SSA-17, e.g., a,b,c, etc.

Item 31 - Refer to Item V or VI of the SSA-401 and show in the "Vocational Background (Occupation)" block the claimant's customary occupation or, if not determined, the longest full-time occupation in the 15-year period immediately preceding the alleged date of onset of disability. The entry should indicate both the industry and the specific job title involved, e.g., coal mining, coal cutting machine operator.

Show in the "Occupational Years" block the number of years that the claimant worked in his customary occupation, if determined, or if not determined, in his longest full-time occupation. When there are broken periods of employment in that occupation, determine the total number of years he was employed or available for employment in the shown occupation.

In the "Educational Years" block, enter the highest grade of school completed by the individual, including any part-time and night courses. Use "12th grade" to indicate completion of high school, "13th grade" for one year of college, etc. Also, enter the type of school and number of years completed in specialized schools, such as nursing school, accounting school or ungraded vocational school.

Item 22 (Diagnosis) - Enter the diagnosis shown in Item 29 on most recent SSA-831 or item 22 on SSA-833 in file; with multiple impairments enter the first impairment listed.

Item 23 (MOB Code) - See §T6269 Item 30 for the appropriate code.

Item 24 Remarks - See §T6269 Item 41 for possible entry to explain special situation.

Item 25 Diary Date - Check TWP block if beneficiary is entitled to and has not completed a TWP and is continuing to work; check block TWP, enter the anticipated eighth month of work. Check "None", when appropriate.

Item 26 - Cross out Disability Examiner, write C/R and sign in this block

Item 27 - Enter current date.

Item 28, 29, and 30 - Leave blank.

Item 31 - For continuance of disability enter the appropriate continuance letter number. (See Exhibits 5 through 9.) For cessation of disability enter appropriate paragraph(s) number (See Exhibit 10).

Letter 10 (Exhibit 8) contains a choice of two inserts. When the file is to be forwarded to BDI in a CDB Continuance after the TWP has expired, the DO will indicate in Item 31 of Form SSA-833 - "10" followed by insert number "1" or "2" (i.e., "10-1" or "10-2"). When the file is to be forwarded to a Program Center indicate in Item 31 "Exhibit 106(a)" - (i.e., "Ex. 106(a)-1"; or "Ex. 106(a)-2"). Use insert "1" when block 21B of Form SSA-833 is checked (TWP completed/Work continuing). Leave Item 31 blank if DWB or DWB-DIB. In reconsideration cases enter Exhibit 12 for DIB or CDB cessation.

Letter 11 - CDB Continuance (TWP Not Expired)

Indicate in Item 31 of SSA-833 "11" in RSI and BDI Cases followed by the date of expected 9th month of TWP, i.e., "11-4/74".

Items 32-33 - Leave blank.

Item 34 Category - Check the appropriate block.

(b) SSA-834 (Continuation Sheet) If used, check Item 12 of SSA-833

Summarize the evidence supporting the DO's conclusion that the claimant was or was not engaged in SGA or has returned to SGA. The rationale for continuance, for example, should show that the beneficiary did not complete his TWP or that it was determined that his work activity after the TWP did not represent SGA.

The DO reviewer should sign and date the SSA-834.

The rationale for cessations should show:

(1) that the due process requirements are met (see §T6273).

(2) that he was or was not entitled to a TWP, that his work activity was determined to be SGA and that his month of cessation was determined to be (month/year).

T6272. FLAGGING CASES INVOLVING SGA WORK ISSUES

When a work issue case is sent to BDI in accordance with §T6266, prepare the flag SSA-2822 (DO Work-Issue-Only-Case Flag - See §T6276 , Exhibit 2). Identify the appropriate category of case in Item 1 and check any applicable block in Item 2. Staple the form securely to the outside of the folder jacket. (See §6276ff and §6280ff for preparation of the folder and assembly of claims material.)

T6273. DUE PROCESS IN WORK ISSUE CASES

(a) General

Advance notice is required before benefits are stopped unless the action is based solely on work information reported by the beneficiary (or his payee), it is clear that he knew the effect of such information when he gave it, and there is no substantive conflict in the evidence. For example, when the folder is documented that the beneficiary has been informed of the purpose of the CDI (e.g., a completed SSA-821(a) is in file) and he reported the information supporting a cessation and no conflict exists (see "b" below), the beneficiary has been afforded "due process" without need for further notice to the beneficiary unless he states that he believes that his benefits should be continued. Any information or evidence received as a result of this contact must be considered before the DO completes its determination.

(b) Material Conflicts in Work Activity Cases

When a material conflict arises from the beneficiary's answers on the report of his work activity or from other evidence, the DO will resolve the conflict with the beneficiary. Where it appears that a determination of cessation will result and the evidence supporting the cessation was not provided by the beneficiary, or it is not obvious that the beneficiary expects his benefits to stop, notify the beneficiary of the proposed stoppage of his benefits, the reasons for the stoppage, and afford him an opportunity to submit rebuttal evidence. A material conflict exists if a discrepancy in the amount of earnings or period of work raises a question about the correct month of cessation, e.g., the beneficiary alleges he did not work or that he did not earn the amount of wages reported. A material conflict may also exist when the beneficiary states that his impairment affects his ability to perform his work, his work is subsidized, or he indicates that he does not believe that his benefits should be ceased. When additional development

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is needed to resolve any issue, this should be done without delay. If there is any doubt concerning the beneficiary's understanding regarding his right to continue to receive benefits, resolve the doubt by furnishing the beneficiary with a predetermination notice to afford him advance notice of benefit stoppage and the opportunity to present rebuttal evidence.

(c) Predetermination Notification

Predetermination notices must contain the following key elements and the folder should be documented accordingly:

Note: Auxiliary beneficiaries not living in the same household must be furnished with a copy of the notice sent the primary beneficiary.

(1) Inform the beneficiary that based on the evidence now in file it appears that a determination would have to be made that he has regained ability to engage in SGA in (month/year.)

(2) Summarize the pertinent evidence and explain why it appears that he has regained the ability to engage in SGA as well as:

(A) the basic facts regarding the nature of the work being done (e.g., job title);

(B) the name of the employer(s);

(C) the number of months employed;

(D) the dates of employment; and

(E) the current or most recent salary.

(3) Explain that we are notifying him at this time to give him an opportunity to present any additional evidence that he wants us to consider.

(4) Tell him that unless we hear from him within 10 days the Social Security Administration will make a formal determination based on the evidence in file. Point out that it is important, therefore, that he submit a statement or evidence within 10 days or let us know if he needs more time.

(5) Explain that when a formal determination is made he will be notified in writing what the determination is. Also inform him that if it is determined he has regained the ability to engage in SGA and therefore that his disability has ceased, he will be eligible to receive benefits for the month in which disability ceased and for each of the two months following that month.

(d) Suggested Language for Predetermination Notice

"Earlier, you were notified that your claim was being reviewed to decide whether you are again able to do substantial gainful work. This is to notify you that based on evidence now in file it appears you regained ability to engage in substantial gainful activity in (month/year)."

Use the following two paragraphs only where the beneficiary was entitled to a trial work period and has completed the trial work period §6703ff. "The Social Security Law provides a trial work period so that you can test you ability to work, despite your impairment, without losing benefits. The trial work period may last for as long as 9 different months in which you have done some work. These 9 trial work months may be consecutive or they may be separated by months in which you do no work at all. Any month in which you worked and earned over $50 in employment or worked more than 15 hours in self-employment since you became entitled to benefits counts as one of the 9 work months.

"Our decision is based on the actual work you did during this 9 month period and how much you have been paid for doing the work. (Earnings of more than $140 a month for instance, usually indicate that a person has regained his ability to do substantial gainful work.)

"The evidence shows that you returned to work in (month/year) for the (employer's name). You worked as (job title). You were paid $ an hour working an average of hours per week. At the present time, you continue to work doing (provide a brief description of duties) and you earn an average of $ a month. Based on the evidence in file, it appears that a determination will be made that you regained ability to engage in substantial gainful activity in (month/year). The law provides that an individual will receive his benefit payments for the month his disability ends and the following 2 months. Therefore, the last disability check to which you would be entitled would be for the month of (month/year).

"We are writing at this time to give you the opportunity to present any additional statement or evidence you want to be considered before a determination is made. If you want to submit such a statement or evidence, please send it to us within the next 10 days using the enclosed envelope which requires no postage.

"If you do not contact us within 10 days we will make a formal determination as to your continuing entitlement to benefits based on the evidence in file. It is important, therefore, that you let us know within 10 days if you want to submit a statement or evidence. If additional time is needed for submission of this material, consideration will be given to your request for more time".

BEST COPY AVAILABLE

(e) Following up on Predetermination Notices

Contacts with the beneficiaries, including auxiliaries, whether in person, by telephone, or by mail should be documented. The DO will set up appropriate diary controls, complete its determination, and send the folder to BDI at the appropriate time. The DO is not expected to follow up with a beneficiary who fails to respond to the letter; if there is no response in 15 days, the DO will complete its action. Where the beneficiary does respond to the letter but requests more time to get additional evidence, the DO should follow up 20 days thereafter if the evidence is not forthcoming. The DO should be in a position to complete its determination no later than the 40th day after the predetermination notice was sent to the beneficiary.

(f) Acknowledging Receipt of Additional Information

Where additional information is received that does not alter the proposed finding of cessation, the DO will prepare a brief acknowledgement. This acknowledgement is required even though the beneficiary's response is not considered substantive. If, as a result of the beneficiary's response the cessation date is changed to a date earlier than the date mentioned in the original predetermination notice, a second predetermination notice is necessary.

The following language should be contained in the notice. "This acknowledges receipt of the additional information you sent to us. It will be considered along with the other evidence in your case in arriving at a determination as to your continuing entitlement to disability insurance benefits. When the formal decision is made, you will be notified."

Note: Do not include any statement as to the significance of the information received.

T6274. SUSPENSION OF BENEFITS BECAUSE OF WORK ACTIVITY

Request for the suspension of disability benefits in work issue cases should only be made when the evidence convincingly establishes a basis for cessation of benefits, an overpayment exists or is imminent, and the DO expects the completion of the CDI to be delayed over 40 days (§6706). Suspension of disability benefits (including auxiliary payments, if any) is to be processed only after advance notice (in person, by phone, or by mail) under "due process" procedures (see §6707). The DO will notify the beneficiary and all auxiliary beneficiaries not living in the same household of any proposed action to suspend benefits (in accordance with §6706) before transmitting a suspension request to BDI. The DO should not suspend if cessation is effective for the current month since the beneficiary is entitled to two additional months of benefits after the month of cessation. The DO will not use the suspension procedure when possible reentitlement after a work cessation exists. The DO should develop and document all aspects of possible reentitlement and send to the SA.

T6275. BDI FEEDBACK TO DO'S ON DEFICIENCIES AND REVISED DETERMINATIONS

Where BDI's review of the case reveals technical deficiencies only, the incorrectly completed items on the SSA-831 will be circled, missing information will be entered, the involved items will be identified in item 41, and the DO copy will be returned for informational purposes.

Where BDI's review reveals a substantive deficiency in the SGA determination, BDI will either revise the determination, return the case to the DO for additional information, or send the case to the SA for a medical vocational determination. In any of these situations, the DO will be notified by BDI on an SSA-DL880, or by a photocopy of SSA-847 (BDI Request for Case Action) which is used to transmit the case to the SA.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

Social Security Administration

March 22, 1974

SSA DISABILITY INSURANCE LETTER NO. II-46

(To be filed at the end of Part II of the
Disability Insurance State Manual)

SUBJECT: Jurisdiction of Work Issue Only Cases

I. General

The State agreements have been modified to exclude from SA jurisdiction any case in which the issue to be resolved is solely whether or not the individual is or was engaging in substantial gainful activity. Social security offices will make determinations of denial, cessation, or continuance, as appropriate, in such cases, subject to BDI review. If a case cannot be decided solely on the basis of whether the claimant engaged in SGA in initial, continuing, or reconsideration cases, the SA will resolve the medical and vocational issues unless the case is otherwise excluded from SA jurisdiction. Thus, some claims in which the district offices have determined that work activity is SGA will be sent to the SA for a determination, for example, the claimant alleges blindness or a closed period of disability can be established. All work issue cases sent to the SA will contain a special determination (Form SSA-553) resolving the SGA question. This rationale should be incorporated into the SA determination.

The following instructions apply only to Title II cases. Instructions for handling work issue Title XVI new claims are included in DIL II-42 (Revised).

II. Work Issue Cases to be Sent to State Agencies

A. Initial Disability Claims

1. Work Activity Not SGA

The claimant is engaging in work activity at the time of filing but the DO concludes that the work activity is not SGA.

2. SGA Ceased

The special determination prepared by the DO shows that the claimant engaged in SGA after the alleged onset date but subsequently ceased SGA. The SA may find an onset date subsequent to the period of SGA, or may find that the claimant is not disabled.

3. Claimant Currently Engaging in SGA but a Closed Period of Disability is Possible

Where the claimant is currently engaging in SGA but previously did not engage in SGA for a period of at least 12 months due to an impairment, the SA will determine whether he is entitled to a closed period of disability. If a closed period can be established, the period will end as of the date the claimant returned to SGA as shown in the DO special determination.

4. Alleged Visual Impairment

If a DIB or freeze claimant, or a CDB claimant age 55 or over, is engaging in SGA but alleges a visual impairment and disability was not previously established, the DO will forward the case to the SA for a disability determination. If disability is established on the basis of statutory blindness, the SA determination should show that the claimant is not under a disability for cash benefit purposes.

If it is determined that the claimant is statutorily blind, and is over age 55, and the DO has determined that he is engaging in SGA, the SA will resolve the issue of whether his work is comparable to the SGA he performed before the date he was both age 55 or older and blind (DIL III-7).

B. Continuing Disability Cases

The beneficiary is not engaging in SGA and either (1) the CDI development indicates possible medical recovery (e.g., new material evidence or a statement of medical

recovery) or (2) the medical diary has matured or will mature within 2 months; the DO will forward the case to the SA.

C. Reconsideration Cases

Reconsideration cases in which there is a need for a medical-vocational determination after DO resolution of the work issue will be sent to the SA. If the basis for the initial denial or cessation was SGA, and the reconsideration evidence now shows that the claimant or beneficiary was not engaging in SGA, the special determination prepared by the DO will include an explanation of why the initial determination is being reversed.

III. Work Issue Arises While Case is in SA

If the SA learns that the claimant or beneficiary is working, development should be discontinued and the file returned to the DO for development and resolution of the work issue, unless the SA has enough information to make a decision on other grounds (e.g., a medical-vocational denial, closed period of disability, or the claimant is entitled to a trial work period). When returning a case to the DO, annotate the folder to show the status of the medical-vocational development in the event that the file is subsequently returned to the SA. Evidence received in the SA subsequent to return of the folder to the DO should be forwarded to the DO for association. If the SA makes a decision on other grounds the completed case should be sent to BDI in accordance with the regular routing procedures.

If the DO is notified of work activity after the file has been sent to the SA, the DO will develop the information necessary for an SGA determination. If it finds that the work activity is cause for denial, it will request the SA to return the folder so that a determination can be made and the claim forwarded to BDI. If the DO determines that the claimant's work is not a basis for denial, or if the SA is making a decision on other grounds (i.e., a medical-vocational denial, closed period of disability, or the claimant is entitled to a trial work period), the developed material and a special determination on the work issue will be forwarded to the SA. Where the DO has received its copy of the SSA-831 from the SA showing that the file was sent to BDI, the DO will notify BDI immediately by teletype that the claimant returned to work and forward to BDI the development and a special determination showing that the claimant did or did not engage in SGA.

IV. Pipeline Cases

Cases that are pending in the SA at the time that these procedures are implemented should be adjudicated if the SA has all the information necessary to make an SGA determination. Cases that are pending in the SA because there is insufficient information to resolve the work issue should be returned to the DO, unless the SA is able to make a decision on other grounds (i.e., a medical-vocational denial, closed period of disability, or the claimant is entitled to a trial work period). For SGA determinations made in the SA subsequent to the change in jurisdiction, the SA should flag the case by stapling a Form OAAD-408 (Route Slip) addressed to BDI to the outside of the folder, with the words "SGA Pipeline Case" in the remarks section of the form.

V. Request for Guidance

Please refer any questions or problems which may arise pursuant to these instructions to the Regional Representative, DI.

Bernard Popick, Director
Bureau of Disability Insurance

Action Note:

DIL III-11, § III.E. (page 10) - Delete the parenthetical statement at the end of the first paragraph and cross-refer this section to DIL II-42 (Revised 1/31/74).

APPENDIX C

Estimated Cost of Providing Oral Evidentiary Hearings Prior to Termination of Social Security Disability Benefits

1. NUMBER OF HEARINGS

The Social Security Administration projects that in the fiscal year 1976 there will be approximately 44,000 initial determinations that disability has ceased. On the basis of past experience (see App. A, *supra,* p. 10A), at least 25 percent (*i.e.,* 11,000) would dispute, and request reconsideration of, that determination under present procedures. If a pre-termination oral hearing were substituted for the present reconsideration procedure (see *id,* at 10A–11A), it seems reasonable to take 11,000 as a base figure for requests for pre-termination evidentiary hearings (cf. p. 51, *supra,* n. 62).

2. LENGTH OF THE PERIOD OF EXTENDED OVERPAYMENTS

The initial element is the period of pre-hearing notice given. While *Goldberg* v. *Kelly,* 397 U.S. 254, indicated that a seven-day notice would ordinarily be constitutionally sufficient for welfare termination hearings (397 U.S. at 268), the nature of the issues, and the possible need to obtain medical witnesses, or to travel to a distant city for a hearing, suggest the advisability of providing somewhat greater notice than that, such as 30 days,[1] even if a shorter period

[1] Under the SSI program, Congress has provided that a person disagreeing with an eligibility determination may request a hearing within 30 days. 42 U.S.C. (Supp. III) 1383(c)(1).

might be constitutionally sufficient. Whatever the period, benefits would presumably have to be paid to all beneficiaries for the month during which it is determined whether a hearing is being sought.

Even assuming that the body conducting the hearings (whether the state agency, the SSA district office, or the Bureau of Hearings and Appeals) could immediately absorb and continue to keep current with the new caseload of hearings, it is unrealistic to assume that hearings will typically be held and cases decided immediately after the minimal notice period. Even without regard to existing caseloads, backlogs and staff shortages, it seems prudent to expect that requests for pre-termination hearings would result in decisions, on the average, no sooner than two months later.[2] To the extent that the realities of the present situations of the agencies involved are considered, this period must inevitably be longer.

3. COST OF BENEFIT OVERPAYMENTS

If benefits are paid to workers subsequent to the initial determination that they are no longer disabled, and that determination is not challenged or is upheld in further proceedings, the net cost of the resulting overpayment of benefits will depend on several factors.

SSA estimates that, under current procedures, initial determinations are made one month after the month of cessation of disability in about half the cases and two or more months after cessation in the remainder. Accordingly, in half the

[2] Under the SSI program, Congress has provided that, after a hearing, determinations shall be made within 90 days of the request for a hearing, "except to the extent that the matter in disagreement involves the existence of a disability * * *." 42 U.S.C. (Supp. III) 1383(c)(2).

cases the two-month grace period (see p. 16, *supra*) has already expired and benefits are terminated immediately, while in the other half benefits are terminated one month after the initial determination. Accordingly, in half the cases any extension of the payment of benefits will be beyond the grace period, while in the other half any extension beyond one-month will do. Thus, as to half of the 33,000 who would not seek a hearing, there would have been a one-month overpayment for the period given within which to do so.

As to those who do seek a hearing, one must estimate the proportion of cases in which the ultimate decision sustains the initial determination that the worker is no longer disabled. Under present procedures, initial determinations concerning initial claims are sustained in about 60 to 70 percent of the reconsiderations (see p. 31, *supra*), and about 50 to 60 percent of the far smaller number of cases in which post-termination hearings are requested (see p. 31, *supra*). If we assume an "affirmance" rate of 60 percent, then in 30 percent of the cases where pretermination hearings are sought there would be overpayments for every month following the initial determination, and in 30 percent there would be overpayments beginning with the second month after the initial determination.

The ultimate cost of all such overpayments depends upon the prospects for recoupment. Since most terminated beneficiaries will presumably not be receiving other payments that the Secretary could withhold, the only alternative would be legal action against those who cannot or will not voluntarily return the overpayments. Even if beneficiaries are fully forewarned that benefits received subsequent to the initial deter-

mination may be subject to repayment if that determination is sustained or if a hearing is not sought, the rate of such recoveries, where warranted, would be low. Moreover, in many cases the Secretary will not be entitled to seek recoupment under the Act and regulations (see pp. 32–33, *supra*). Based on past experience, SSA believes that a recoupment rate exceeding 33 percent would be unrealistic.

Application of these figures to the current average monthly benefit of $335 produces a total cost of approximately $10,000,000 for the first month following the initial determination and $1,500,000 for each month of delay thereafter. Under present procedures at least ten months now elapse from the request for a hearing to the decision after hearing (see pp. 50–51, *supra*), and if comparable delays were to occur with pre-termination hearings the cost in overpayments alone could amount to $23,500,000 annually.

4. ADDITIONAL ADMINISTRATIVE COSTS

The actual administrative cost involved in proviaing the necessary hearings is a function of the cost per ing to SSA, the average cost of an administrative law judge hearing is currently $536. Thus, the 11,000 projected hearings would cost about an additional $6 million annually. Although a state agency hearing structure might entail lower costs per hearing (estimates vary between $150 and $200 per hearing) there would be the added costs, both in dollars and in hours, of training personnel and implementing a totally new system.

Against these costs must be offset the cost of some unpredictable portion of the post-termination hearings (currently 1,900) as well as the 11,000 reconsidera-

tions[3] that would not be required (see p. 63A, *supra*). Even if, contrary to the premise of *Goldberg* v. *Kelly*, (see p. 52, *supra*, n. 63), all post-termination hearings were eliminated or rendered unnecessary, the additional administrative costs would still be substantial, ranging from about $1.3 million to $4 million annually.[4]

In addition, a requirement of live medical testimony at such hearings would substantially increase the costs. *Richardson* v. *Perales*, 402 U.S. 389, 406; cf. *Staff Report* 229.

[3] No precise data on the cost per reconsideration is available, but the average unit cost of all state agency determinations (excluding the cost of consultative medical examinations) was $50 in 1973 (*Staff Report* 150), and we use that as a rough estimate.

[4] Depending whether the hearing cost averages $200 or $500.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 570-081

Supreme Court, U. S.
FILED
MAY 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-204

CASPAR W. WEINBERGER,
Secretary of Health, Education & Welfare,
Petitioner,

v.

GEORGE ELDRIDGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The respondent states that the Secretary of Health, Education and Welfare has accurately stated the opinions and references thereto in his brief.

JURISDICTION

The Secretary of Health, Education and Welfare has accurately stated the jurisdiction of this Court in his brief.

QUESTION PRESENTED

Was George Eldridge denied due process of law under the Constitution of the United States when his Social Security Disability Benefits, which had twice been awarded him following a full evidentiary hearing, were terminated by the Secretary of Health, Education and Welfare without the opportunity being afforded him of an evidentiary hearing, of equal purport, as the hearing in which he was found to be entitled to such benefits?

STATEMENT

The respondent does not disagree with the statement made in the Secretary's brief, however points out that George Eldridge was initially awarded disability benefits by a hearing examiner (now Administrative Law Judge) on June 8, 1968. These benefits were terminated without affording George Eldridge *any* opportunity of offering evidence of continued disability on February 18, 1970. On June 26, 1970, the United States District Court for the Western District of Virginia ordered benefits to continue until a final determination was made. On May 6, 1971, approximately sixteen (16) months following the decision to terminate benefits, a

hearing examiner for the Social Security Administration determined George Eldridge's disability had not ceased.

On June 12, 1972, George Eldridge was advised that it had been determined that he was *again* no longer disabled as of May, 1972. He was not advised of what medical reports or what doctors had made this determination. In fact, assuming that George Eldridge could and did read and understand the contents of the termination letter (which may or may not be a false assumption), he was not told that the cumulative effect of his impairments were not disabling (as is required by Social Security regulations to be done by a physician designated by the Secretary of Health, Education, and Welfare).

George Eldridge, then, was advised that it had again been determined (for a third time) that he was no longer disabled and that his disability benefits would cease in July, 1972. This was done irrespective of the two prior hearing determinations that he was indeed disabled, and irrespective of George Eldridge's own assertions that his condition had worsened.

The United States District Court for the Western District of Virginia enjoined the Secretary from withholding disability benefits noting that the Secretary's procedures failed to satisfy due process standards.

Thus, after a *third* hearing before a tribunal, it was again determined that George Eldridge's disability continued, and his benefits should not cease.

SUMMARY OF ARGUMENT

George Eldridge's disability benefits were terminated by the Secretary of Health, Education and Welfare without an opportunity for an evidentiary hearing, even though his disability had been twice found continuing at evidentiary hearings. George Eldridge was thus denied his constitutional due process. While a good volume of the Secretary's brief is devoted to propounding the procedural system of the Social Security Administration and the virtues of the same, it is submitted that it has not shown any justifiable reason for terminating George Eldridge's disability benefits without affording him an opportunity for an evidentiary hearing.

The Secretary has not shown that less stringent due process standards should be afforded Social Security disability recipients upon termination of benefits than those outlined in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The Secretary does not contend that George Eldridge's continued receipt of disability benefits is not a property interest protected by due process considerations (brief, p. 36).

George Eldridge was twice awarded benefits following evidentiary hearings. He had been determined not to be disabled prior to each of the evidentiary hearings. It may be true that "he who giveth may taketh away", but it is respectfully submitted that the taking should be done only after the beneficiary has been afforded an opportunity for an evidentiary hearing of equal import or status as the two prior hearings at which his benefits were awarded.

ARGUMENT

Where a disability recipient is found to have a disability following a "full-blown" evidentiary hearing, benefits should *not* be terminated prior to an equally "full-blown" evidentiary hearing.

The Social Security Administration at no time informed George Eldridge that his condition had improved. Indeed, the Secretary points out in his brief that George Eldridge informed the State Agency that the Agency already had "enough evidence" (p. 8, 11, 34) to show that he was disabled within the meaning of the Social Security regulations. Logically, if one has been determined disabled twice before quasi-judicial administrative proceedings, which entailed an evidentiary hearing, and one is not advised that his condition has improved, then certainly, he reasons, his benefits should not be summarily terminated without the benefit of a hearing of at least equal due process standards as the hearing which had twice awarded him the benefits. It is noted that approximately eighteen months elapsed from George Eldridge's notice in February 1970 that his disability had terminated and the decision of the hearing examiner in May 1971 holding that his disability had indeed not ceased. This was a full eighteen months in which George Eldridge and his children would have been without benefits (to which he was ultimately found to be entitled). Eighteen months for a disabled individual with dependent children is an extremely long time to be summarily denied benefits from a system to which he has contributed.

The Secretary argues that in determining what procedures utilized in denying or terminating statutory benefits satisfy due process, the competing interests must be accommodated. The interests are held by this Court to be:

1. The workers' interest in continued receipt of disability insurance benefits assessed in light of the *reliability* (emphasis added) of the existing procedures and

2. The government's interest in avoiding unneeded administrative burdens and costs that would deplete the ability of the disability insurance trust fund to pay out the maximum proportions of its revenues as benefits to eligible workers.

It is submitted that George Eldridge's case shows and emphasizes the non-reliability of the Secretary's termination procedures. Twice did the termination procedures dictate the termination of benefits and twice were these procedures shown to be inaccurate and wrong after George Eldridge was given a hearing before a hearing examiner.

The Secretary has argued in his brief that disability benefits are unrelated to need, thus distinguishing this case from *Goldberg v. Kelly*. Indeed, a widower shown to be twice totally and permanently disabled, and with dependent children, could hardly be in more need. Not only is a disability recipient unable to seek employment due to his physical impairment, but other assistance programs may well deny benefits because of his potential eligibility to disability benefits through Social Security. The Secretary urges that a worker should avail himself to welfare benefits if they are truly needy. It is submitted that one should not force himself to

indigency due to the procedures selected by the Secretary, which procedures he has twice found to be unreliable.

While cross-examination may be of limited value where there is a question which is medical in nature, there can be no question, however, of the value of rebuttal evidence and actual testimony and face-to-face confrontation and viewing of the claimant. An evidentiary hearing, where the claimant himself makes an appearance, gives the decision-maker the opportunity to actually view the claimant and witness his condition, whether it be physical or mental, and allow the claimant an opportunity to present his side of the case.

It is recognized that there are those individuals who qualify for Social Security benefits, who later recover and are able to become gainfully employed. For those who are only temporarily disabled and should be terminated, it is submitted that procedures could be instituted by the Secretary to allow the recipient to elect a hearing or not. If a hearing is chosen, and the disability recipient is unsuccessful, then the overpayment would be recoverable from his future earnings. For those, such as George Eldridge, the success would not be an empty success, which follows financial disaster and resulting emotional calamity.

As pointed out on page sixteen (16) of the Secretary's brief, a claimant must "prove disability". That is, he must prove that he is permanently and totally disabled. This is exactly what George Eldridge did in proving his entitlement to disability benefits. He had been through the entire allegedly "reliable" administrative procedure twice, and twice he had been awarded benefits when the person making the decision

saw him and gave him an opportunity to appear before him.

The record does not reveal that an opportunity was ever given George Eldridge to participate in any rehabilitation program. Therefore, it would appear that the discussion in the Secretary's discussion of termination following rehabilitation is totally inapplicable in George Eldridge's case.

It is submitted that the figures quoted by the Secretary on page fifty four (54) of his brief are indeed misleading. Certainly where one must submit birth certificates and where a work record or marriage license is needed to substantiate or justify termination, then no hearing could possibly be beneficial or warranted.

The Secretary points out on page forty (40) of his brief that "termination of disability benefits will ordinarily result only when there has been some distinct change of circumstances." The record is void of any indication of any distinct change in George Eldridge's condition. Indeed, George Eldridge asserted that his condition had worsened. The Social Security Administration termination letter indicated no new medical evidence that his condition had improved. In George Eldridge's case, evidence that his condition had progressed from being unable to engage in any substantial gainful activity to employable was non-existent.

The United States Court of Appeals for the Fourth Circuit has held that there are four elements of proof to be considered in making a finding of a Claimant's disability under the Social Security Program. In addition to the objective medical facts, diagnosis and expert medical opinions on subsidiary questions of fact

and the claimant's education, background, work history, and present age, the Court lists "the subjective evidence of pain and disability testified to by Claimant, and corroborated by his wife and his neighbors" *Underwood v. Ribicoff*, 298 F.2d 850, 851 (4th Cir., 1962). In *Underwood*, the Court stated that "expert medical diagnostic opinion and evidence, alone, may not enable a fact finder properly to determine whether or not such limitation of capacity amounts to disability within the terms of the Act. *Underwood v. Ribicoff*, supra, at p. 852.

The Secretary is urging that the Court in *Underwood* was wrong concerning subjective evidence, or any evidence other than the "cold record." The history of George Eldridge's case clearly shows the importance of such evidence. The Secretary urges that the claimant should be left to the mercy of the reporting doctor's ability or inability to compose a report which will relay the extent of the claimant's disabilities. It is submitted that George Eldridge is statistical proof that such reports do not inevitably suffice in revealing the disability of a claimant.

In arguing that other assistance programs are available for the disability recipient, the Secretary has failed to discuss the eligibility requirements for such assistance. Welfare benefits usually require one to be destitute and without any appreciable assets. This is certainly no acceptable substitute for a worker who suddenly finds himself unable to work and unable to support himself or dependents. As to the alternative benefits available, it is pointed out that:

1. Qualification for welfare benefits may require more stringent standards than qualification for Social Security disability benefits.

2. A welfare recipient may submit his property to a lien for the amount of assistance received.

3. Welfare benefits do not commence spontaneously but rather start after a sometimes lengthy investigation.

Applications of Goldberg vs. Kelly Hearing Requirements to Termination of Social Security Benefits, 26 Stanford Law Review 549 (1974).

As stated by this Court, "it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison." *Wolff v. McDonnell* 42 U.S.L.W. 5190 (1974). In *Wolff,* this Court held that, in state prison disciplinary proceedings, an inmate should be allowed to call witnesses on his own behalf when to do so would not jeopardize prison safety or correctional goals. *Wolff,* at p. 5198. In *Wolff,* this Court was dealing with a state prison system and based its decision against the background of the disciplinary procedures required in such an institution. In the case presently under consideration, there is no danger of prison disruption as was present in *Wolff,* supra, and it is submitted that the only disruption is that propounded by the Secretary in his brief which does not appear to be substantiated by the statistics, especially where such a basic constitutional right as due process is concerned. *Goldberg v. Kelly,* supra, at 265.

It is submitted that George Eldridge is as much entitled to an opportunity for an evidentiary hearing concerning his termination of disability benefits as:

1. A welfare recipient concerning his welfare check, *Goldberg v. Kelly,* supra;

2. A wage earner concerning his paycheck, *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969);

3. A parolee concerning his freedom, *Morrisey v. Brewer,* 408 U.S. 471 (1972);

4. A prison inmate concerning his good time credits, *Wolff v. McDonnell,* supra;

5. A consumer concerning his old stove, *Fuentes v. Shevin,* 407 U.S. 67 (1972);

6. An uninsured motorist concerning his license, *Bell v. Burson,* 402 U.S. 535 (1971);

7. An elderly person concerning his Medicare benefits, *Martinez v. Richardson,* 472 F.2d 421 (10 Cir. 1973).

8. A student concerning his suspension from school, *Goss v. Lopez* 43 L.W. 4181 (1975).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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May 1975

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-204

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL AND REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION AND SUMMARY

In this supplemental and reply brief, we address the jurisdictional question raised by this Court's decision in *Weinberger* v. *Salfi*, No. 74–214, decided June 26, 1975 (subsequent to the filing of our opening brief) and reply to certain arguments put forward by respondent and *amici curiae* in their briefs on the merits.

1. The district court lacked jurisdiction to hear this case. Under this Court's decision in *Salfi*, the federal

district courts are precluded from exercising jurisdiction over an action seeking review of a decision of the Secretary, "save as [jurisdiction is] provided [by Section 205(g) of] the Act" (slip op., p. 6). The latter provision grants jurisdiction only to review a "final decision of the Secretary made after a hearing," and the decision of the Secretary to terminate the payment of respondent's disability payments was not "final." Respondent was entitled to administrative reconsideration of that decision and, if necessary, to a full evidentiary hearing on the factual question of disability, before the Secretary would have rendered a "final" decision. Exhaustion of those procedures might have resulted in reversal of the initial administrative decision and retroactive payment of benefits, which would have fully remedied the injury that respondent alleges he has sustained from the Secretary's initial termination order. Want of jurisdiction in this case does not foreclose later judicial consideration of the constitutional issue respondent seeks to raise here, for a district court could consider that issue upon review of a final decision of the Secretary.

2. In reply to the arguments presented by respondent and *amici* on the merits, we make the following points:

a. The question on the merits is whether the Secretary's existing procedures afford a fair basis for temporarily withholding disability benefits from an individual pending further review of his claim of a continuing disability. The principal objection to those procedures stated by respondent and *amici* is the absence of the opportunity for a personal appearance before the Secretary's delegate. But a disability recipient may appear before the state agency, which must make the initial recommendation of non-disability, and a personal appearance is in any event of only limited utility in view of the fact that a finding of disability must be based upon medically acceptable evidence.

b. The determination of non-disability upon which the Secretary's termination order is based is highly reliable. Most recipients accept that determination as correct, and only 12.2 percent of such determinations are reversed upon reconsideration or after an oral hearing.

c. The temporary termination of disability benefits does not render the recipient's "situation * * * immediately desperate." *Goldberg* v. *Kelly,* 397 U.S. 254, 264.

d. *Amici* seriously underestimate the administrative burdens and financial costs of requiring a full evidentiary hearing prior to an initial determination that disability has ceased.

I

THE DISTRICT COURT LACKED JURISDICTION TO HEAR THIS CASE

We are obliged by this Court's decision in *Weinberger* v. *Salfi,* No. 74–214, decided June 26, 1975, to address a question of jurisdiction that has not previously been discussed.

1. The named plaintiffs in *Salfi,* a widow whose husband died within nine months of the date of their marriage and her daughter by a previous marriage, had filed applications with the Secretary for mother's and child's insurance benefits. The applications were denied both initially and upon reconsideration at the regional level, because the plaintiffs had not met the duration-of-relationship (marriage for nine months) requirement of Section 216 of the Social Security Act, 42 U.S.C. 416. Contending that that requirement denied due process, the plaintiffs then instituted a suit for declaratory and injunctive relief and money damages on behalf of themselves and all others who had been rendered ineligible for benefits as a result of the duration-of-relationship requirement. A three-judge district court granted the requested relief, and the Secretary appealed directly to this Court.

The Court first considered whether the district court had correctly assumed jurisdiction. The second sentence of Section 205(h) of the Act provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." [1] The Court determined that the provision precluded the district court from asserting jurisdiction over the named plaintiffs' complaint, which sought review of the Secretary's decision, at the regional level, denying their application for benefits, "save as [jurisdiction is] provided [by Section 205(g) of] the Act" (slip op., p. 6).

[1] The third sentence of Section 205(h) further provides: No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [Section 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act].

Section 205(g) confers jurisdiction upon the federal district courts to review "any final decision of the Secretary made after a hearing * * *." Although the decision denying the plaintiffs' application for benefits had not been made after a hearing, the Court held that the district court had jurisdiction to hear plaintiffs' suit on their own behalf because (1) "a hearing would be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law * * *" (slip op., at p. 15) and (2) the Secretary had determined that the reconsideration decision was "final" within the meaning of Section 205(g).[1A]

2. In this case, respondent had applied for disability insurance benefits under the Social Security Act, and such benefits were awarded effective June 1968. In June 1972, the Secretary initially decided, subject

[1A] The Court further held that the district court had lacked jurisdiction over the claims of the unnamed members of the class (slip op., at p. 12):

> As to class members, * * * the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g). Other sources of jurisdiction being foreclosed by § 405(h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

to administrative review, that respondent's disability had ceased and that he therefore was no longer eligible for benefits; the Secretary ordered respondent's benefits terminated effective July 1972. Respondent did not pursue his administrative remedies. Instead, respondent sought immediate judicial review, contending that the termination of his disability insurance benefits had deprived him of property without due process, and requesting, in effect, that the Secretary's order terminating the benefits be vacated, and the benefits reinstated, pending an evidentiary hearing.

Since respondent's action, like that of the named plaintiffs in *Salfi,* seeks review of a decision of the Secretary, it falls within the prohibition of the second sentence of Section 205(h) that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as * * * provided [by Section 205(g)].[2] But Section 205(g) did not confer

[2] The appellants in *Norton* v. *Mathews*, No. 74–6212, question of jurisdiction postponed until hearing on the merits, June 30, 1975, contend that, notwithstanding this Court's decision in *Salfi*, the district courts may assert mandamus jurisdiction under 28 U.S.C. 1361 in Social Security cases, reasoning that the *third* sentence of Section 205(h) (see note 1, *supra*) precludes only the exercise of federal-question jurisdiction. We intend to address that issue at greater length in our brief in *Norton*. It is sufficient here to point out that respondent's action, which seeks review of a decision of the Secretary, is governed as well by the *second* sentence of Section 205(h) which precludes such review "except as herein provided," *i.e.*, except as provided by Section 205(g). That sentence plainly bars the district courts from exercising mandamus jurisdiction over actions, such as this one, brought to review a decision of the Secretary.

jurisdiction over respondent's suit. The jurisdictional predicate under that statute is a "final decision * * * made after a hearing," and respondent's very objection to the Secretary's order terminating respondent's disability benefits is that that order was not "made after a hearing."

Moreover, this is not a situation where the jurisdictional requirement of an exhaustion of administrative remedies, including a hearing, should be or has been obviated by the Secretary's determination that the decision was "final." The Secretary's order terminating respondent's disability benefits manifestly was not "final." Respondent was entitled to administrative reconsideration of that decision and, if necessary, to a full evidentiary hearing on the factual question of disability. See generally pp. 14–33 of our opening brief.

Respondent's exhaustion of the available administrative remedies would not have been "futile and wasteful." If the Secretary upon review had found that respondent was in fact entitled to continued payment of disability benefits, he would also have been entitled to retroactive benefits covering the period during which they had been discontinued. See p. 32 of our opening brief. Payment of retroactive benefits would have remedied the injury that respondent would have sustained from the termination and thereby would have eliminated the necessity of judicial consideration of his claim that that termination was wrongful. Thus application to this case of the strict jurisdictional limitations of Section 205(g) fur-

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Accordingly, in such circumstances the constitutional claim would not be mooted by the reinstatement of benefits. See also *Roe* v. *Wade,* 410 U.S. 113, 124–125.[3]

II

RESPONDENT WAS NOT ENTITLED TO A PRE-TERMINATION ORAL HEARING

A. EXISTING PRE-TERMINATION PROCEDURES FURNISH AN ADEQUATE BASIS FOR DETERMINING WHETHER TO WITHHOLD PAYMENT OF BENEFITS PENDING FURTHER ADMINISTRATIVE REVIEW

Respondent and the *amici* (see especially AFL–CIO Br. 9) appear to contend that the Due Process Clause establishes a right not just to fair procedures but to a specific, fixed form of evidentiary hearing prior to even a temporary deprivation of property. But it is clear that the requirements of due process are more flexible than respondent and the *amici* suggest. See, *e.g., Arnett* v. *Kennedy,* 416 U.S. 134, 167–171 (concurring opinion of Mr. Justice Powell). The question, in a case such as this, is not whether there is a "right"

[3] On the other hand, a district court determination sustaining the Secretary's finding of non-disability would moot the constitutional claim. There would be no substantial likelihood of repetition of the alleged injury, for respondent would no longer be an eligible beneficiary subject to possible termination. Nor would respondent be entitled to retroactive benefits for the period from the date of the termination order to the date of the hearing; affirmance of the finding that respondent had recovered from his disability as of the date of termination would deprive him of any rightful claim to disability benefits for the post-termination period. See Section 223(a) of the Act.

to an evidentiary hearing, but whether the existing procedures are fair. As Judge Friendly recently observed in a comprehensive review of the requirements of procedural due process, "if an agency chooses to go further than is constitutionally demanded with respect to one [common element of a fair hearing] * * *, this may afford good reason for diminishing or even eliminating another." Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1279 (1975); footnote omitted.

We deal here not with governmental action that finally deprives a person of a property interest to which he claims to be entitled, but only with a preliminary determination that is subject to *de novo* review and revision after a full evidentiary hearing. It is not constitutionally inappropriate to provide less elaborate procedures when only a temporary, rather than a permanent, deprivation of a protected interest is at issue; that distinction underlies, for example, the difference in procedures required for pre-trial detention of a suspect and post-trial incarceration upon conviction. The specific question presented here is whether the procedures now followed by the Secretary provide a sufficiently reliable and fair basis for temporarily withholding disability benefits from an individual pending further review of his claim of a continuing disability.

The Secretary's procedures for initially determining that disability benefits should no longer be paid include the essential elements commonly considered requisite to a "fair hearing." These include an unbiased

tribunal; notice of the action taken and the grounds asserted for it; an opportunity to present reasons why the action should not be taken; the rights to present evidence, to know the evidentiary basis of the adverse decision, and to have the decision based only on the evidence presented; the right to be represented by retained counsel; and the rights to a record of the evidence presented and to a statement of reasons. See Friendly, *supra,* 123 U. Pa. L. Rev. at 1279–1295.

The principal grievance of respondent and *amici* is that the beneficiary is not entitled to appear personally before the person responsible for deciding whether he is still disabled before his benefits are provisionally terminated.[4] This right is necessary, they say, because the issues in disability cases are "too complex to be correctly resolved entirely on paper" (AFL–CIO Br. 10), and because it is essential, for due process, that the decisionmaker "eyeball" the beneficiary and that the latter be able to provide in person "subjective" evidence of pain and suffering (Williams Br. 7–8, 10; AFL–CIO Br. 10–13). This argument, however, is based upon a misconception of the existing procedures. Those procedures do not entail decision of disability claims "entirely on paper" and without regard to subjective evidence. Such evidence can be submitted prior to the initial determination by

[4] *Amicus* AFL–CIO would apparently insist upon the rights to subpoena witnesses and to cross-examine adverse witnesses (Br. 13, n. 5). No one has suggested that the procedures resulting in an initial determination must be open to the public or subject to judicial review.

letter, affidavit, or otherwise, including a personal visit to the state agency responsible for the initial recommendation of non-disability. Moreover, a full evidentiary hearing is available prior to the Secretary's final determination.

In any event, the "subjective" evidence that a personal appearance would principally serve to provide cannot by itself be the basis of a determination of disability. A finding of disability must be supported by "medically acceptable" evidence. Section 223(d)(3) and (5) of the Act.[5] A beneficiary's descriptions of his ailments may have probative value, but since such evidence cannot be dispositive, due process does not require an opportunity for a beneficiary to present it orally prior to a preliminary termination of benefits. Indeed, where there is no medically acceptable evidence of disability before the Secretary, such an oral presentation would serve no purpose whatsoever.

B. EXISTING PRE-TERMINATION PROCEDURES ARE NOT UNRELIABLE

Focussing entirely on the results in the relatively few cases in which a determination that disability has ceased is reviewed in a full evidentiary hearing before an administrative law judge, *amici* contend that the rate of "reversal" is so high (about 55 percent) and such correction comes so late (about one year after termination) that the pre-termination procedures

[5] Those provisions were modified and strengthened in 1968 as a result of congressional concern that courts were relying unduly upon merely "subjective," nonmedical evidence. See H.R. Rep. No. 544, 90th Cong., 1st Sess. 29–31 (1967).

must be deemed constitutionally inadequate (Williams Br. 5–6; AFL–CIO Br. 7–10). Of course, the fact that an initial determination is reversed upon reconsideration or after an evidentiary hearing does not itself show that the initial determination was unreliable. See pp. 43–44 of our opening brief. In any event, *amici* overstate the relevant rate of reversal. They ignore the crucial "overall error rate for all denials of benefits" (*Fusari* v. *Steinberg,* 419 U.S. 379, 383, n. 6), which this Court has said is an important part of a "complete assessment" of a system of procedure. *Ibid.*[6] Indeed, we think that overall error rate, which is only 12.2 percent here,[7] is the best measure of the reliability and fairness of the initial determination process.

Moreover, approximately 75 percent of these "reversals" occurred upon administrative reconsideration

[6] In *Fusari*, the Court also took note of the reversal rate of appealed decisions, as that was apparently the only rate for which information was available. 419 U.S. at 383.

[7] Footnote table follows:

Calendar Year 1973

	Amount	Percent of A.
A. Initial determinations that disability had ceased	33,595	100.
B. Adverse initial determinations accepted without challenge	24,843	73.9.
C. Requests for reconsiderations	8,752	26.1.
D. Reconsiderations favorable to worker	2,967	8.9 (34.1 percent of C.)
E. Reconsiderations unfavorable to worker	5,765	17.2 (65.9 percent of C.).
F. Adverse reconsiderations accepted without challenge	3,887	11.6 (67.4 percent of E.).
G. Requests for evidentiary hearing by ALJ	1,878	5.6 (32.6 percent of E.).
H. ALJ decisions favorable to worker	1,101	3.3 (58.6 percent of G.).
I. ALJ decisions unfavorable to worker	777	2.3 (41.4 percent of G.).
J. Total adverse initial determinations subsequently reversed (D. plus H.)	4,068	12.2 (46.7 percent of C.).

Figures based on HEW's answers to interrogatories in *Green* v. *Weinberger*, No. 2219–73, D.D.C., set forth in part by *amicus* AFL–CIO (AFL–CIO Br. 1a–2a), and in part as an Appendix to this brief (App., *infra*, pp. 21–22).

without a hearing. Since the procedures upon reconsideration are essentially the same as those employed before termination (see pp. 30 and 9A–11A of our opening brief), the "reversals" upon reconsideration do not imply that post-termination procedures are inadequate; such reversals normally reflect merely the consideration of additional documentary evidence submitted by the beneficiary.

C. RESPONDENT AND *AMICI* OVERSTATE THE RECIPIENTS' INTEREST IN AVOIDING TEMPORARY WITHHOLDING OF DISABILITY BENEFITS

We recognize that, for many recipients, Social Security disability benefits are an important source of financial support. But that fact standing alone does not establish a constitutional right to a full-blown evidentiary hearing prior to a temporary withdrawal of such benefits. See *Arnett* v. *Kennedy, supra* (sustaining the temporary removal of a federal employee without a prior hearing). Moreover, it is inaccurate to suggest, as respondent does (Resp. Br. 9), that these termination cases involve "a worker who suddenly finds himself unable to work and unable to support himself or dependents." Since disability benefits are not based upon need, recipients, or their families, may well have assets or other sources of income; they also will typically have (as a result of the time required for investigation and the two-month grace period) several months forewarning of the possible termination of benefits before it actually occurs, during which

period measures may be taken to offset the temporary loss of benefits pending further administrative review.[8] For example, a person might seek limited temporary or part-time employment, notwithstanding that he claims to be still "disabled' (see pp. 18, n. 15 and 25 of our opening brief).

Although this Court has indicated that the possibility of receiving welfare benefits must be taken into account (see p. 38 of our opening brief), respondent dismisses welfare as being "unacceptable" (Resp. Br. 9). He also suggests, joined by *amici* (Resp. Br. 9–10; see Williams Br. 3, n. 1; AFL–CIO Br. 17), that a terminated disability recipient may be ineligible for welfare. *Amici* apparently assume that the only available welfare program would be the federal SSI program. But state and local programs may also be available. Moreover, as we have shown (see pp. 22–23 and 38, n. 39 of our opening brief), termination of Social Security disability benefits prior to an evidentiary hearing does not mean that SSI benefits will also be terminated before such a hearing has been held. Furthermore, welfare is only one of several possible sources of interim income that may be available to a person claiming to be still disabled (see pp. 18, 38 of our opening brief).

[8] We note that respondent, who professed to be able to "get by" without disability benefits (A. 13–14), waited six months after his benefits terminated before seeking a preliminary injunction reinstating the payment of benefits (A. 14–15).

D. *AMICI* MISAPPREHEND THE ADMINISTRATIVE BURDEN AN FINANCIAL COSTS OF REQUIRING A FULL EVIDENTIARY HEARING PRIOR TO AN INITIAL DETERMINATION THAT DISABILITY HAS CEASED

Amici err in contending that the Secretary's assessments of the likely costs and administrative burdens of requiring a full evidentiary hearing before an initial determination to terminate disability benefits may be made and effectuated are overstated (Williams Br. 10–13; AFL–CIO Br. 18–23). Their argument is that current procedures need be changed only by continuing the payment of benefits until the recipient acquiesces in the finding of non-disability or exhausts his administrative remedies, including an oral hearing (Williams Br. 5 n. 3, 11; AFL–CIO Br. 21) and that the increased costs that that change would entail could be minimized by " 'developing procedures for prompt pre-determination hearings and by skillful use of personnel and facilities' " (Williams Br. 12).

But substantial additional costs would be entailed if payment of benefits were continued during the several-month period needed to enable all recipients to request, and those requesting it to receive, reconsideration of the initial determination that disability has ceased (see pp. 64A–65A of our opening brief). *Amici* are unrealistic to suggest that pre-termination evidentiary hearings could be provided within a month or two of the initial determination of non-disability (Williams Br. 12; AFL–CIO Br. 22). Even on their

premise that the number of pre-termination evidentiary hearings were to remain the same as the present number of post-termination hearings (about 1,900), that suggestion blinks reality. The existing administrative structure is already being pressed to its limit in coping with an enormous backlog of requests for evidentiary hearings (see pp. 49–54 of our opening brief), and it presently takes nearly a year before such hearings can be held. The Secretary's efforts to reduce the backlog of hearing requests [9] would be nullified if the number of requests for evidentiary hearings in disability cases were to increase from the present 1,900 to 11,000, the number anticipated if pre-termination evidentiary hearings are to be required.[10] The administrative problems would, moreover, be rendered unmanageable, and the costs enormous, if the requirement of a prior evidentiary hearing were to be

[9] We are advised by HEW that it has recently hired and trained 43 new administrative law judges and has authorized the hiring of supplementary legal and clerical assistance for its staff of administrative law judges.

[10] That estimate was based upon the realistic assumption that the percentage of recipients who contest the initial determination of non-disability would not fall below the present rate of 25 percent. We see no basis for *amicus* AFL–CIO's assumption (AFL–CIO Br. 21) that that rate would fall to only 6 percent. Indeed, it can be anticipated that the rate would in fact increase, for even recipients who might otherwise be inclined to accept the finding of non-disability would have an incentive, not currently present, of prolonging administrative consideration as a means of prolonging the receipt of benefits.

extended to other actions taken by the Secretary, as some lower courts have done.[11]

Amici apparently believe that a concern over the costs of implementing a requirement of pre-termination oral hearings is not entitled to weight (Williams Br. 10; AFL–CIO Br. 19). But such concerns should not be so blithely disregarded. Increases in the already-swollen administrative costs of the disability program [12] will consume limited funds and resources that therefore cannot be used to pay benefits. As Judge Friendly has aptly observed (Friendly, *supra,* 123 U. Pa. L. Rev. at 1276):

> It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of pro-

[11] See, *e.g.*, *Mattern* v. *Weinberger*, C.A. 3, No. 74–1776, decided June 3, 1975, holding that due process requires a full evidentiary hearing before the Secretary may temporarily reduce benefit payments to recoup past overpayments. But see *Frost* v. *Weinberger*, 515 F.2d 57 (C.A. 2), petition for a writ of certiorari pending *sub nom. Frost* v. *Mathews*, No. 75–5220. See generally Friendly, *supra*, 123 U. Pa. L. Rev. at 1300, n. 168. The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Mattern*.

[12] In fiscal 1974 administrative costs of the disability program were $338.2 million to serve 3.76 million beneficiaries (about $90 per beneficiary), while for the far larger retirement and survivors program, serving 27.8 million beneficiaries, administrative costs were only $583.7 million (about $21 per beneficiary). Social Security Administration, *The Year in Review* 13, 21 (1975).

tecting those likely to be found undeserving will probably come out of the pockets of the deserving. [Footnote omitted.]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss. In the alternative, that judgment should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
KEITH A. JONES,
Deputy Solicitor General.

OCTOBER 1975.

APPENDIX

In the United States District Court for the District of Columbia

Civil Action No. 2219–73

RUFUS GREEN, BILLY JOE LAMBERT, PATSIE LAMBERT, RONDA LAMBERT, LEITHA LAMBERT, JEANETTE LAMBERT, AND MARY ANN LAMBERT, THROUGH THEIR FATHER AND NEXT FRIEND, BILLY JOE LAMBERT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

vs.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, THE UNITED STATES OF AMERICA, DEFENDANT

Defendant's Answers to Plaintiff's First Interrogatories

In accordance with the provisions of Rule 33 of the Federal Rules of Civil Procedure, I, Samuel E. Crouch, Acting Director of the Bureau of Disability Insurance, being duly sworn, answer, to the best of my knowledge, information, and belief, the plaintiff's interrogatories as follows:

* * * * *

14. Please state the number of times that payment of social security disability benefits were terminated pursuant to an "initial determination" (as defined in 20 C.F.R. § 404.905) that disability had ceased:

(a) For the calendar year 1969—41,895

(b) For the calendar year 1970—48,918
(c) For the calendar year 1971—37,585
(d) For the calendar year 1972—36,589
(e) For the calendar year 1973—33,595

* * * * *

16. Please state the number of times that after benefits were terminated pursuant to an "initial determination" (as defined in 20 C.F.R. § 404.905) that disability had ceased the recipient involved requested and received reconsideration of the determination:

(a) For the calendar year 1969—9,454
(b) For the calendar year 1970—10,298
(c) For the calendar year 1971—11,247
(d) For the calendar year 1972—11,184
(e) For the calendar year 1973—8,752

17. Please state the number of times and percentage of occurrence when benefits were terminated pursuant to an "initial determination" (as defined in 20 C.F.R. § 404.905) that disability had ceased that upon reconsideration those benefits were reinstated:

(a) For the calendar year 1969—3,213—34.0%
(b) For the calendar year 1970—4,378—42.5%
(c) For the calendar year 1971—4,305—38.3%
(d) For the calendar year 1972—3,494—31.2%
(e) For the calendar year 1973—2,987—34.1%

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

No. 74-204

Supreme Court of the United States

October Term, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, *Petitioner*,

v.

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND FOR THE PLAINTIFFS IN GREEN, ET AL. v. WEINBERGER, ET AL. (D. D.C. NO. 2219-73) AS AMICI CURIAE

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This brief *amici curiae*, in support of the position of George H. Eldridge, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the plaintiffs in *Green, et al.* v. *Weinberger, et al.* (D. D.C. No. 2219-73), with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 110 national and international unions having a total membership of approximately 13,500,000 working men and women.

The question in the instant case is whether an injured

working man or woman receiving Social Security disability benefits can have the payments he or she is receiving cut off without an evidentiary prior hearing even though one is requested.

The individual members of the AFL-CIO constitute the largest single class of beneficiaries of the Social Security disability system. The nature of the procedures utilized in that system is therefore a major concern of the Federation.

The plaintiffs in *Green et al.* v. *Weinberger et al.* (D. D.C. No. 2219-73) are Rufus Green, Billy Joe Lambert, Patsie Lambert, and the Lambert's minor children, Ronda, Leitha, Jeanette, and Mary Ann. (In the Social Security disability program, when a disabled worker's benefits are terminated, the benefits paid directly to his dependent children are cut off at the same time.) The *Green* case involves the same question presented in the instant case. *Green* is a class action and the class has been certified by the district court as "those individuals whose [Social Security disability] benefits have been, are, or may be terminated by the Secretary." (Memorandum and Order, July 29, 1974.) All proceedings in *Green* have been stayed pending the resolution of the instant case by this Court.

In *Green*, factual material as to how the present procedures work, relevant to both that case and this, has been obtained through the discovery process. That material is set out in the Appendix to this brief (at pp. 1a-5a *infra*). It is to bring the Court's attention to this additional information, and to present argument in support of the position of George H. Eldridge, that this brief *amici curiae* is filed.

ARGUMENT

I. The Limits of the Controversy

In *Richardson* v. *Wright* 405 U.S. 208, 209 (1972) this Court deferred resolving the question of whether Social Security disability benefits may constitutionally be cut off without an evidentiary prior hearing:

> "Shortly before oral argument, we were advised that the Secretary had adopted new regulations, effective December 27, 1971, governing the procedures to be followed by the Social Security Administration in determining whether to suspend or terminate disability benefits * * *. In light of that development, we believe that the appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute * * *. In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise."

After three years of experience under the new "paper hearing" procedures (*Richardson*, 405 U.S. at 214 (Brennan, J. dissenting)) evolved by the Secretary while the *Richardson* case was pending in this Court, the question reserved in that case is ripe for disposition. The facts as to how that system works are in and a verdict can now be rendered.

At the outset we identify in some detail what an affirmance of the court below would, and would not, mean.

First, affirmance would not require the development of new hearing procedures. The Social Security disability system already provides a *post termination* evidentiary hearing for disabled workers who dispute the cut off of their

benefits. In terms of content, that hearing affords disability recipients the "minimal procedural safeguards • • • demanded by rudimentary due process." (*Goldberg* v. *Kelly*, 397 U.S. 254, 267) (*viz.*, a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at the hearing (see *id.* at 267-271)). *Goldberg* itself makes clear that such a hearing "need not take the form of a judicial or quasi-judicial trial" (*id.* at 267), with the latter's attendant time consuming formalities such as adherence to the rules of evidence, and the prohibition of hearsay, etc. Indeed, the Court has underlined this precise point in the Social Security disability context. (See *Richardson* v. *Perales*, 402 U.S. 389.) Thus, here, as in *Goldberg*, the dispute is over the *timing* of the evidentiary hearing, not its content.

Second, affirmance would not require an evidentiary hearing in every case. At the present time such hearings are accorded only in disputed cases and not in those in which the recipient accepts the Secretary's "paper hearing" administrative decision. The results of what can aptly be termed a laboratory experiment in an analogous context demonstrate that moving the evidentiary hearing from the post to the pre-termination stage does not increase the number of recipients requesting such hearings. In *Hiatt* v. *Indiana Employment Security Division*, 347 F. Supp. 218 (N.D. Ind) (three-judge court), vacated and remanded for consideration of possible mootness, *sub. nom., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 541-542, the district court's order

requiring Indiana to conduct evidentiary prior hearings was in effect from October 27, 1971 until February 21, 1973, the date it was vacated by this Court. Comparing the period January-March 1971 and January-March 1972, there was an 8% decrease (from 829 requests to 764) in the number of recipients seeking a hearing.[1] Moreover, utilizing the same periods of comparison, the percentage of hearings at which the recipients prevailed increased during the time in which the district court's order was in effect.[2]

The Secretary states that the interests to be assessed in determining when an evidentiary prior hearing is constitutionally required are:

> "First, the nature of the property • • • interest of which a person is assertedly being deprived • • •; second, the risk of an erroneous deprivation of such interest through the procedures used • • •; and third, the administrative burdens and costs that particular

---

[1] Compare [Jan.-Mar. 1972] U.S. Dept. of Labor, Unemployment Insurance Statistics [U.I. Stats.] Table 18, p. 10 with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14.

The Secretary claims that in the welfare system, the number of terminated recipients seeking hearings "altered significantly" two years after *Goldberg* was decided, "jumping" from 1.2% to 2%, a differential of 1.67 (Sec. Br. p. 52). Assuming the same rate of increase, which is unlikely given the unemployment compensation experience under the *Hiatt* decree, and using the most recent Social Security data (see App. pp. 1a-2a, *infra*), the number of hearings that would be required for the entire country would increase from 1,878 to 3,136, a far cry from the Secretary's spectre that affirmance would result in the holding of 18,370 evidentiary hearings a year. (Sec. Br. p. 52.)

[2] Compare [Jan.-Mar. 1972] U.I. Stats. Table 18, p. 10 (49.2% success factor) with [Jan.-Mar. 1971] U.I. Stats. Table 18, p. 14 (45% success factor).

procedural requirement would entail." (Sec. Br. p. 36.)

We agree. For, these are the very factors upon which the *Goldberg* Court predicated its conclusion that an evidentiary prior hearing is the pre-condition for a cut-off of welfare. The Court there recognized that the loss of welfare "may deprive an *eligible* recipient of the very means by which to live" (397 U.S. at 264; emphasis in original); that, in the absence of an evidentiary hearing the "welfare bureaucracy [has] difficulties in reaching correct decisions on eligibility" (*id.* at 264, n. 12); and that, given the risk of erroneous decisions, the needs of the recipient are not "outweighed by countervailing government interests in conserving fiscal and administrative resources" (*id.* at 265). As Mr. Justice White subsequently restated the lesson of *Goldberg:*

> "The greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision, cf. Morrissey v. Brewer [408 U.S. 471], and thus the Court in Goldberg, while maintaining that the pretermination hearing was in the nature of a probable cause determination, was less willing to allow a margin of error as to probable cause." (*Arnett* v. *Kennedy,* 416 U.S. 134, 201 (concurring and dissenting opinion).)

Thus the governing principles are well settled. The crux of the controversy here is whether the Secretary's soothing assurances that the "procedures now followed in terminating Social Security disability benefits are fair, and [that] they work" (Sec. Br. p. 55), prove out, or whether his arguments are nothing more than a carefully contrived illusion designed to create the appearance of a system that comports with the Constitution. As we now show, an

analysis of the interests identified by the Secretary leads, not to the conclusion he reached, but to the certainty that in this case, as in *Goldberg,* an evidentiary prior hearing is constitutionally required.

II. The Risk of Error

(A). In *Fusari* v. *Steinberg,* —— U.S. ——, 43 U.S.L.Wk. 4121, the Court recently remanded a case challenging the cut-off of unemployment compensation without an evidentiary prior hearing to the district court for reconsideration of the operation of that termination procedure in light of intervening changes in state law. Mr. Justice Powell put forward two measures of the legality of a procedure in which the evidentiary hearing is deferred to the post-termination stage: "the reversal rate of appealed denials of benefits" (*id.* at 4122); and the "delay [in] obtaining administrative review" (*id.* at 4123). We therefore begin by applying that model to the Social Security disability termination system.

First, the present disability termination procedures are less accurate than deciding disputed cases by flipping a coin. In 1973, 58.6% of all appealed decisions terminating Social Security disability benefits were reversed following evidentiary hearings; in 1972 the reversal rate was 54.7%. (App. p. 2a *infra.*) (The figures for 1974 are not yet available.)

Indeed, the present procedures have turned out to be less effective than those in effect prior to the January, 1972 "reform" that prompted the *Richardson* Court to stay its hand to permit the Secretary to "evolve procedures to meet needs as they arise." (405 U.S. at 209.) For,

in 1971, 1970 and 1969, the reversal rates were 53.7%, 55.2% and 54.9% respectively. (App. p. 2a *infra.*)

The inadequacy of the present "paper" procedures is further confirmed by a comparison to the facts in *Goldberg* and in *Fusari.* In the former, the Court noted the "particularly telling" significance of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." (397 U.S. at 264, n. 12.) There, the reversal rate was only 36%. (See *Kelly* v. *Wyman,* 294 F. Supp. 893, 907 (S.D. N.Y. 1968) (three-judge court).) And in *Fusari,* the Court found a reversal rate ranging from 19.4% to 26.1% to be "significant." (43 U.S.L.Wk. at 4122.)

Second, the disability system's lack of reliability is not alleviated by prompt post-termination hearings. And, the "rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." (*Fusari,* 43 U.S.L.Wk. at 4124.) Disabled workers who dispute their cut-offs must wait approximately 12-15 months for an evidentiary hearing. (Sec. Br. p. 35.) No benefits are paid during this period despite the fact that if a recipient is among the approximately 55% who are wrongfully cut-off he is so disabled that he is unable "to engage in *any* substantial gainful activity." (42 U.S.C. § 423(d)(1)(A); emphasis added.) In *Fusari,* a 126-day delay prompted the Court to characterize Connecticut's system of administrative appeal as "torpid," and to note that the "system often failed to deliver benefits in a timely manner." (43 U.S.L. Wk. at 4123.)

The Secretary contends evidentiary hearings do not "improve to any significant extent the already substantial reliability of the existing disability termination procedures." (Sec. Br. p. 44.) The claim that the present procedures produce accurate results is, in fact, the dominant theme of that brief. (See Sec. Br. pp. 10, 12, 13, 27-32, 34-36, 39-45, 55.) In *Fusari* the Court looked to "the reversal rate of appealed decisions" as the measure of the unemployment compensation termination system's reliability. (42 U.S.L.Wk. at 4122.) We have followed the Court's lead. The Secretary has not, most probably because that reversal rate undermines his entire case. Since necessity is the mother of invention, he would substitute the "percent of the initial determination of cessation of disability [in] which post termination review results in a decision favorable to the worker." (Sec. Br. p. 32.) For, that approach enables him to claim that 85% of the 35,000 "paper hearing" cut-off decisions (26,000 of which are not appealed (75%)) are not reversed on appeal. (Sec. Br. p. 31.) But the inquiry the Secretary suggests is not germane to the issue in this case. As we have stressed, the Court is called upon to decide only whether those disabled workers who *request* an evidentiary hearing are to be granted that hearing at the pre-termination stage. (Pp. 3-4 *supra.*) Given that question, the only relevant bench-mark is the percentage of disabled workers who would not have been wrongfully cut off had they been accorded an evidentiary prior hearing upon request. In this case that percentage is approximately 55%.

The Secretary would also explain away the damning reversal rate just noted on the ground that the subsequent hearing occurs months after a cut-off, during which time "new evidence" may have appeared. (Sec. Br. pp. 12-13, 31-32, 45 & n. 50.) But the reversal rate in the disability system is not a function of the passage of time. The present procedures provide for a "paper hearing,"

then a paper reconsideration, then an appeal to an Administrative Law Judge who conducts an evidentiary hearing, and then a further appeal to an Appeals Council "which may review the record *de novo* and may receive additional evidence." (Sec. Br. pp. 30-31.) This final appeal, of course, occurs even longer after the initial cut-off than the evidentiary hearing, but the reversal rate at this stage is only 12% (Sec. Br. p. 31); a far cry from the approximately 55% reversal rate at the prior appellate step.[3]

The comparison between these two reversal rates does more than discredit the Secretary's attempt to put the present system in a better light than the facts will permit. It is an independent verification of the intuitively obvious proposition, central to anglo-american jurisprudence, that an evidentiary hearing is far more likely than the available alternatives to produce a determination of contested factual issues that will stand up on review. We now turn to the reasons why this is so.

(B). The questions involved in Social Security disability cases are simply too complex to be correctly resolved entirely on paper. They involve such subjective considerations as failure to cooperate with Social Security authorities (20 CFR § 404.1539(c)), whether a recipient "has regained his ability to engage in substantial gainful activity • • • as demonstrated by work activity" (20 CFR § 404.1539(a)(2)), or, whether disability has ceased as evidenced by medical recovery (20 CFR § 404.1539(a)(1)). As the Secretary himself states, these decisions implicate "inherently dynamic factual conditions." (Sec. Br. p. 25.)

[3] It cannot be mere happenstance that the only reversal rate not included in the Secretary's Brief is the reversal rate at the evidentiary hearing. (See Sec. Br. p. 31.)

A finding that a disabled worker "has regained his ability to engage in substantial gainful activity as demonstrated by work activity" depends on the nature of the work performed, the adequacy of the performance, and the special conditions, if any, of the employment, as well as an evaluation of the time spent and the amount of money earned by the recipient. (20 CFR §§ 404.1532-404.1534.)

The decision on whether disability has ceased as evidenced by medical recovery turns on such elements as:

> "(1) the objective medical facts, which are the clinical findings of treating or examining physicians divorced from their expert judgments or opinion as to the significance of these clinical findings, (2) the diagnoses, and expert medical opinions of the treating and examining physicians on subsidiary questions of fact, (3) the subjective evidence of pain and disability testified to by Claimant, and corroborated by his wife and his neighbors, (4) Claimant's educational background, work history, and present age • • •. The ultimate fact in issue; that is, Claimant's ability or inability to engage in any substantial gainful activity, is not to be resolved, however, solely on the basis of medical opinion evidence as to this ultimate fact • • •. It then becomes necessary to consider subjective testimoney to determine accurately the effect of these impairments upon the Claimant. Such evidence may be entitled to great weight on the matter of disability • • •. Even though severe physical limitation be established, it is still necessary in applying the legal standard to relate this standard to the Claimant's work history and educational background • • •. Indeed, the Secretary's regulations • • • expressly provide: "Conditions which fall short of the level of severity indicated must

also be evaluated in terms of whether they do in fact prevent the individual from engaging in any substantial gainful activity." (*Underwood* v. *Ribicoff*, 298 F.2d 850, 851-852 (4th Circuit, 1962.)[4]

Congress has recognized the difficulty of making disability determinations:

> "[E]ach substantive determination of disability calls for an individual application of a set of necessarily complex medical and vocational facts to the definition of disability which is in the Social Security Act, the precedents and interpretative guides for which have been of an evolutionary rather than an established nature * * *." (*Administration of Social Security Disability Insurance Program*, Prelim. Rep. to the House Comm. on Ways & Means by the Subcomm. on the Administration of the Social Security Laws, p. 5 (March 1, 1960).)

Indeed, during the initial debate in Congress on the creation of the disability program, the American Medical Association labeled disability an "elusive concept." (Hearings on H.R. 7225 Before the Senate Comm. on Finance,

[4] The other Circuits share the Fourth Circuit's view that disability decisions turn on subjective considerations that are best understood on the basis of the testimony of witnesses at an evidentiary hearing:

> "The Act and the regulations promulgated by the Secretary pursuant to it require a subjective determination of the claimed disability. Symptoms which are real to the claimant, although unaccompanied by objective medical data, may support a claim for disability benefits." (*Bittel* v. *Richardson*, 441 F. 2d 1193, 1195 (3rd Cir., 1971).)
>
> "[E]ven pain unaccompanied by objectively observable symptoms which is nevertheless real to the sufferer and so intense as to be disabling will support a claim for disability benefits." (*Ber* v. *Celebrezze*, 332 F. 2d 293, 299 (2d Cir., 1964).)

84th Cong., 2d Sess., pp. 833-836 (1956).) For, as the American Academy of General Practice testified: "unfortunately, medical science has not reached the point of being able to unerringly state whether or not a man is totally and permanently disabled." (*Id.* at 358.) In *Perales*, 402 U.S. at 399, this Court recognized that in Social Security disability cases, it is "not uncommon" for "triers of fact" to be faced with "conflicting medical evidence."[5]

In short, disability cases, perhaps even more than welfare cases, turn on difficult and complex resolutions of hotly contested factual questions. The evidence underlying disability decisions is precisely that relied upon in a personal injury trial. And as our crowded court calendars attest, this is classic grist for the adversary mill. Since "rules of procedure are often shaped by the risk of making an erroneous determination (See In re Winship, 397 U.S. 358, 368 (1970) (Harlan, J. concurring)" (*Arnett*, 416 U.S. at 201 (White, J. concurring and dissenting)), evidentiary prior hearings are required in the Social Security disability system no less than in the welfare system.

[5] The Secretary's assertions to the contrary notwithstanding (Sec. Br. pp. 40-41), *Perales* does not sanction the "paper hearing" procedure. In that case, the Court did not address the timing of the Social Security disability "evidentiary hearing," which is the issue here. Rather, it clarified the content of that term by ruling that hearsay evidence is admissible. And, in so doing, the Court endorsed the principle, stressed in *Goldberg*, 397 U.S. at 269-270, that the opportunity to confront and cross-examine adverse witnesses is a basic procedural safeguard. Seven separate passages of the Court's opinion make it clear that the Social Security disability evidentiary hearing provides a full opportunity to subpoena, confront and cross-examine all witnesses. (See 402 U.S. at 397-410.)

III. The Harm Caused

The Secretary argues that the economic predicament facing a disability recipient wrongfully cut-off does not approach that of the welfare recipient in *Goldberg*. (Sec. Br. pp. 37-39.) To be sure, because Congress chose to preserve "the self reliance, the dignity and the self-respect of disabled workers" (H.R. Rep. No. 1189, 84th Cong., 1st Sess., pp. 4-5 (1955)), it did not establish a means test: "From the outset, social security • • • disability • • • benefits have been 'afforded as a matter of right, related to past participation in the productive processes of the country.' Final Report of the Advisory Council on Social Security 17 (1938)." (*Weinberger* v. *Wiesenfeld*, —— U.S. ——, 43 U.S.L.Wk. 4393, 4397.) But "the • • • system is structured to provide benefits in part according to presumed need." *(Id.)* As the Secretary recognizes, "Most people who get a social security check depend on it for the necessities of life." (Pet., App. C., p. 20A.) Congress' presumption, and the Secretary's acknowledgement, are born out by the facts.

Workers who do the hard and dirty jobs and who are typically among the lowest paid are most likely to draw upon the Social Security disability program. The most accurate, complete and recent data the Secretary has been able to provide is that:

> "The 1965 statistics indicate that the mean income of the family unit of a disabled worker was $3,803.00. The median income for a similar grouping was $2,-836.00. The mean financial assets of disabled workers' family units was $4,862.00; the median for a similar group was $940.00. For purposes of the study, financial assets were defined as liquid assets, such as cash

> in banks, credit unions, and similar institutions, and United States Savings Bonds at face value; the market value of stocks, bonds or shares in mutual funds; and amounts due from loans to other people." (App. pp. 5a-6a *infra*.)[6]

In that year the official government poverty line was an income of $3,223 a year. (U.S. Bureau of Census, Current Population Reports, Series P-60, No. 98, p. 160, Table A-1, 1975.) And, other studies indicate that 90% of severely disabled workers have no earnings whatsoever:

> "Few disabled workers increase their incomes through earnings. Only ten percent, about 127,000 of almost 1.3 million, report any earnings at all • • •. For those with earnings, the annual median is $655; about half earn under $600 a year. Ninety percent of the total beneficiary population earn nothing." (Franklin, "Earnings of the Disabled-Worker Beneficiaries," *Social Security Bulletin*, p. 18 (June 1974).)[7]

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[6] This data, compiled in 1966, is the most current available. (App. p. 5a.) In light of the recent inflationary spiral there is every reason to believe that the comparative position of disabled workers is worse today than at that time.

[7] Despite the fact that a social security disability recipient may be without any other assets, he is ordinarily unable to supplement his disability benefits with benefits from Supplemental Security Income (SSI), the welfare program for the disabled. The average monthly Social Security disability payment is $205.68; in Virginia where Mr. Eldridge resides, the average is $199.55. (OASDI Monthly Cash Benefits by State and County of Residence, Social Security Administration, Department of Health, Education and Welfare, Table RS: 52.11 (December, 1974).) Sixty-six and two-thirds percent of Social Security disability recipients receive monthly benefits in excess of $175. *(Id.)* Unless a state supplements federal SSI benefits, a disabled worker with a monthly income over $166 is automatically ineligible for SSI. (42 U.S.C. §§ 1382(a)(1)(A), 1382a(b)(2).) Virginia, like the majority of

Moreover, since the median liquid assets available to disabled workers is $940, and since there is a mandatory five month waiting period prior to initial receipt of benefits (42 U.S.C. § 423 (c)) it is all but inconceivable that the typical recipient would have assets to carry him through the 12-15 month period during which he must normally wait for a post-termination evidentiary hearing.

The Report of the Advisory Council on Social Security, H.R. Doc. No. 9290, 92d Cong. 1st Sess., p. 28, 48-49, speaks to the important role played by social security benefits—and especially disability benefits—in meeting the most basic needs:

> "Disability generally occurs without warning and in many cases deprives workers of what otherwise would be the most productive of their working years. Few workers have sufficient resources to sustain them throughout a long-term disability and, for most, social security benefits offer the only substitute for the earnings that have been lost • • •.
>
> • • • •
>
> "[The Act's] objectives are to assure that when earnings from work are cut off because of the retirement, disability, or death of the family breadwinner, each covered worker and his family will have a continuing source of income related to his previous earnings and to assure that they can get this protection with dignity • • •."

states does not supplement federal SSI benefits. (Supplemental Security Income for the Aged, Blind and Disabled, Summary of State SSI and Medicaid decisions, Department of Health, Education and Welfare, Social Security Administration, § 12999 Appendices I-X (rev. Feb. 4, 1975).) And, in those states that supplement the federal SSI grant, the average amount of the supplement is between $10 and $25. *(Id.)*

But, for the disabled worker whose benefits have been wrongfully cut off there is no "prospect for some form of support during the period between pretermination and final hearing on appeal • • •." (*Arnett*, 416 U.S. at 201, (White, J., concurring and dissenting).) He can not "secure a job in the private sector," and he is categorically "[in]eligible for welfare benefits." (*Id.* at 169 (Powell, J., concurring).)

As a result of his disability, the recipient is, by definition, unable to "engage in *any* substantial gainful activity." (42 U.S.C. § 423 (d)(1)(A); emphasis added.) And, since the Secretary employs the identical definition of disability in both the Title II Social Security disability program and in the companion welfare system for the disabled, Supplemental Security Income ("SSI"), terminated disability recipients are automatically barred from going on welfare.[8]

Thus, it is simply not true that a recipient " 'may be able to secure a job' [or] 'will be eligible for welfare benefits.' " (Cf. Sec. Br. p. 32.)[9] Here, as in *Goldberg*, "termination of aid pending resolution of a controversy over

[8] Compare 42 U.S.C. § 423(d)(1) with 42 U.S.C. § 1382 c (a)(3).

[9] Nor is general assistance ("country poor relief") a feasible alternative. Since that form of welfare is locally operated and financed there are many political subdivisions which do not have such a program. Where it does exist it is completely inadequate to provide even a bare subsistence level of support. The average payment is $11.00 per week. (See, President's Commission on Income Maintenance Programs, Background Papers, 279 (1969).) Consequently in *Goldberg* the possibility of local general assistance did not prevent the Court from requiring evidentiary prior hearings.

The Secretary relies upon Mr. Eldridge's assertion that he could "get by" without his benefits as evidence of another unspecified source of income. (Sec. Br. p. 39.) When placed in context, the statement simply shows Eldridge's understandable frustration with

eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." (397 U.S. at 264; emphasis in original.)

IV. The Government's Interest

This case is wholly distinct from the line of cases stemming from *Fuentes* v. *Shevin*, 407 U.S. 67,[10] involving the competing due process claims of two private parties to the same private property. The dilemma facing the Court there was that a holding that one private party to the controversy had a right to a prior hearing had the inevitable result of depriving the other of his right to a prior hearing. That dilemma is not present here because the social security disability program is wholly funded by the federal government from social security taxes.

This proceeding is equally distinct from the prior hearing cases in which non-pecuniary government interests were present: See *Arnett*, 416 U.S. at 168 ("Prolonged retention

a procedure that had twice denied him benefits for prolonged periods pending his success at evidentiary hearings:

> "The people at the Disability Section in Richmond have never made a yes decision in my case, I have always had to have a hearing in order to get the decision made properly. Even at the last hearing that was held in my case I had to employ an attorney, and the Examiner made his decision wholly in my favor and stated in his decision for my checks to continue without interception [sic]. So go ahead and make your own decision in the case, I know I'm not able to work, if I ever get able to work again I will, I will get by someway without the Social Security even though I paid into it while I was able to work." (A. 13-14.)

[10] See also *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 604; *Dillard* v. *Industrial Commission of Virginia*, 416 U.S. 783, 798; *North Virginia Finishing Inc.* v. *Di-Chen, Inc.*, —— U.S. —— 43 U.S.L. Wk. 4192.

of a disruptive * * * employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." (Powell, J. concurring in part)); *Goss* v. *Lopez*, —— U.S. ——, 43 U.S.L.Wk. 4179, 4185 ("The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action"). Indeed, *Goldberg* itself distinguished the situation that eventually came before the Court in *Arnett*—discharge from public employment. (See 397 U.S. at 264.)

For, the sole government interest advanced here is one of increased administrative cost. Thus this case is like *Goldberg*. And, by any fair reckoning these costs are substantially less than those entailed by *Goldberg* in the far larger welfare programs. *Goldberg* recognized that the "benefits paid to ineligible [welfare] recipients pending decisions at the hearing probably cannot be recouped since these recipients are likely to be judgment proof." (397 U.S. at 266.) In contrast the Secretary concedes that substantial recoupment is accomplished in the Social Security disability program. (Sec. Br., App.C, p. 66a.)[11] Further,

[11] The lower court pointed out:

> "[T]he Secretary assumes that all of those demanding hearings will lose, and that the Secretary will be unable to recover any of the benefits paid to beneficiaries pending the hearing. Both of these assumption are unwarranted. Not only do a substantial number of persons demanding a hearing prevail [nearly twice the percentage in welfare] but the Secretary is directed to require a refund from the beneficiary or decrease future benefits in the case of an overpayment. 20 C.F.R. §§ 404.501-404.502." (Pet. App. B, p. 15A.)

unlike welfare, the Social Security statute provides for a two month "grace period" after a recipient's "disability ceases" during which time benefits continued to be paid. (42 U.S.C. § 423(a).) Thus if hearings were held within this period, there would be no overpayments at all.

The Secretary's estimate of the administrative costs—"as much as $25,000,000 involved annually" (Sec. Br. p. 14)—is grossly inflated.[12] The reasons given for this "estimate" simply do not withstand scrutiny.

The Secretary contends that substantial delays and costs would result because a pre-termination hearing would require a "fundamental restructuring of the existing institutions." (Sec. Br. at 47.) He opines that hearings would either have to be held by state agencies "not equipped to hold evidentiary hearings" or at SSA district offices that do not have staff trained for that purpose. (Sec. Br. pp. 47-49.) A more simple and obvious solution, that apparently escaped the Secretary, was pointed out by the court below:

> "[T]here are currently post-termination hearing procedures provided • • • and the Secretary could comply with the requirement for pre-termination hearings by merely changing the timing of the hearings. This was done in the case of welfare recipients after Goldberg, and there has been no showing that it could not be done here." (Pet. App. B, p. 14A.)

The Secretary's original cost estimates were based on the assumption that if an opportunity for an evidentiary prior hearing were provided, one would have to be held in each termination case. The obvious fallacy of this posi-

[12] The Secretary's figures below varied at different stages of the proceedings between $16 million and $45 million. (See Pet. App. B, p. 14A.)

tion was pointed out by the district court. (Pet. App. B, pp. 14A-15A.) The Secretary contends at this juncture that 11,000 additional hearings will be required, but even this reduced figure is not a fair extrapolation from the known facts.

The Secretary assumes that if the decision below is affirmed two evidentiary hearings—pre-termination and post termination—would have to be held. But, as the Court pointed out in *Goldberg*, "[d]ue process does not, of course, require two hearings." (397 U.S. at 267.) The Secretary also assumes that even if the percentage of disputed cases does not increase (25%), the absolute number will, based on "past experience." (Sec. Br., App. C, p. 63A.) Without providing any substantiation, he projects that the number of cut-offs will increase from 35,000 in 1973 (Sec. Br. p. 31) to 44,000 (Sec. Br., App. C, p. 63A). But past experience proves quite the contrary. Since 1970 the number of terminated disabled workers requesting an evidentiary hearing has never exceeded 6%. (App. pp. 1a-2a *infra*.) And the number of terminations has steadily *declined*. (1970—48,918 terminated, 1,962 evidentiary hearings held; 1971—37, 538 and 1,861; 1972—36,589 and 2,034; 1973—33,598 and 1,878 (App. pp. 1a-2a, *infra*).)[13]

The Secretary's cost figures are also predicated upon the present 10-11 month waiting period for an evidentiary

[13] In addition, in making his projection the Secretary has ignored the reconsideration stage. If that facet of the system were retained, past experience indicates that 40% of disputed cut-off cases would be resolved in favor of disabled workers without an evidentiary hearing. (Sec. Br., App. A, pp. 10A, 11A, n. 21). These recipients should have been eliminated from the pool for whom evidentiary hearings would have to be provided.

hearing. (Sec. Br., p. 51, App. C, p. 66A.) The Court noted in *Goldberg* that:

> "the State is not without weapons to minimize • • • increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." (397 U.S. at 266.)

The experience following this Court's decision in *California Human Resources Dept.* v. *Java*, 402 U.S. 121, in which unemployment compensation benefits were required to be paid pending an evidentiary hearing on an employer's appeal, is instructive. Prior to *Java*, the *median* period for an unemployment compensation evidentiary hearing in California was 49 days in 1968, and 40.5 days in 1969. (*Java*, 402 U.S. at 128 n. 6). But in 1973, roughly 60% of the appeals decisions were rendered in 30 days or less. ([March—April, 1974] U.I. Stats., Table 17b, p. 28.) There is no apparent reason why a similar reduction could not be accomplished here.

In sum, it continues to be true, in the district court's words, that:

> "the assumptions and omissions in the Secretary's analysis of the cost of requiring pre-termination hearings in disability cases make [his] figure almost meaningless. It is perhaps true that some additional cost will be entailed by the government in providing pre-termination hearings to those disability recipients who request it, but it does not appear that the government's interest in minimizing costs and maximizing administrative efficiency are of such overwhelming significance in this case as to outweigh the needs of the individual not to be erroneously found to be able to engage in substantial gainful activity." (Pet. App. B, pp. 14A-15A.)

Finally, in assessing costs, the Secretary ignores the other side of the ledger,—"[t]he same governmental interests that counsel the provision of [disability benefits], counsel as well its uninterrupted provision to those eligible to receive it." (Cf., *Goldberg*, supra 397 U.S. at 265.) The present "paper hearing" procedure results in the wrongful denial of benefits to the majority of disabled workers who challenge their cut-offs. Yet "one of the principle goals of the Administration is to see that disability beneficiaries get their checks • • • at the time they expect them, and that the right check continues to be sent • • • *on time as long as he continues to be eligible for such benefits.*" (HEW Disability Insurance State Manual, reprinted in Pet. App. C, pp. 20A-21A; emphasis in original.) These recipients are men and women who, before they became totally disabled, paid into the Social Security system so that, should they be struck with a disability and no longer able to work, they would have some means of support. Here, as in *Goldberg*, "pre-termination evidentiary hearings are indispensable to that end." (397 U.S. at 265.)

CONCLUSION

For the above stated reasons, the judgment below should be affirmed.

Respectfully Submitted

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May, 1975

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Rufus Green, Billy Joe Lambert, Patsie Lambert, Ronda Lambert, Leitha Lambert, Jeanette Lambert, and Mary Ann Lambert, through their father and next friend, Billy Joe Lambert, individually and on behalf of all others similarly situated, *Plaintiffs,* vs. Caspar W. Weinberger, individually and in his capacity as Secretary of the United States Department of Health, Education, and Welfare, The United States of America, *Defendant.*	Civil Action No. 2219-73

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES

• • • •

14. "Please state the number of times that payment of social security disability benefits were terminated pursuant to an initial determination (as defined in 20 C.F.R. § 404.-905) that disability had ceased:"

(a) For the calendar year 1969 — 41,895
(b) For the calendar year 1970 — 48,918
(c) For the calendar year 1971 — 37,585
(d) For the calendar year 1972 — 36,589
(e) For the calendar year 1973 — 33,595

• • • •

19. "Please state the number of times that after benefits

were terminated pursuant to an initial determination (as defined in 20 C.F.R. § 404.905) that disability had ceased and upon reconsideration this initial determination was upheld that the recipient involved requested and received a full evidentiary hearing:"

(a) For the calendar year 1969—1,819

(b) For the calendar year 1970—1,962

(c) For the calendar year 1971—1,861

(d) For the calendar year 1972—2,034

(e) For the calendar year 1973—1,878

20. "Please state the number of times and percentage of occurrence when the initial determination was reversed and benefits reinstated by the hearings referred to in Interrogatory #19:"

(a) For the calendar year 1969— 998—54.9%

(b) For the calendar year 1970—1,084—55.2%

(c) For the calendar year 1971— 999—53.7%

(d) For the calendar year 1972—1,113—54.7%

(e) For the calendar year 1973—1,101—58.6%

• • • •

January 28, 1975

Mr. Thomas Stout
Office of The General Counsel
Social Security Administration
Room 628
6401 Security Boulevard
Baltimore, Maryland 21235

Re: *Green, et al.*, v. *Weinberger, et a*
U.S. District Court for the
District of Columbia
Civil Action No. 2219-73

Dear Tom:

Confirming our telephone conversation earlier today, we would like to request the following information, if available, on the Social Security Disability Program:

1) the average and median income of Social Security disability recipients;

2) the average and median financial assets of Social Security disability recipients;

3) the average and median length of time between the filing of a reconsideration request and a decision thereon;

4) the average and median length of time between filing a request for a full administrative hearing and the decision thereon.

In answering these questions please utilize the most recent time period for which such information has been compiled.

Thank you very much for your cooperation.

Sincerely,
Stephen P. Berzon
Attorney for Plaintiffs

cc: Eric B. Marcy
Assistant U.S. Attorney

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of The Secretary
Baltimore, Maryland 21235

March 7, 1975

Office of The
General Counsel
Telephone
301-594-7007

Mr. Stephen P. Berzon
Children's Defense Fund
1763 R. Street, N.W.
Washington, D.C. 20009

Re: Green, et al. v. Weinberger, et al.
(D. D.C., Civil No. 2219-73)
(Our ref: GC:SS:TStout)

Dear Mr. Berzon:

In response to your letter of January 28, 1975, the following information is submitted:

1. The mean length of time between the filing of a reconsideration request and a decision is 86 days. The median length of time between the filing of a reconsideration request and a decision is 68 days. This information is based upon a sample of recent reconsideration decisions. The information pertains to all types of Title II disability cases, including initial and cessation reconsiderations. Apparently, a substantial part of this time lapse involves preparation of notice of the decision. For example, in cases in which a denial is affirmed upon reconsideration, the State agency releases the notice of denial, not the Bureau of Disability Insurance. In this situation, which may more closely approximate the *Green* case, the mean and median time periods are 50 and 46 days, respectively.

2. We are advised that the mean length of time between filing of a request for a full administrative

hearing and a decision after hearing is 221 days. The equivalent median period is 211 days. This information is based upon decisions rendered for the period November 10, 1974, to December 7, 1974. Again, this information relates to all Title II disability hearings, including hearings regarding initial claims and cessation claims. Individuals who are currently requesting hearings may anticipate that a hearing will be held within 10 to 11 months.

3. With respect to your questions regarding the average and median income and average and median financial assets of social security disability recipients, the available information is somewhat dated and is not precisely responsive. Our most recent information was compiled in 1966 from a sample done in 1965. The statistical personnel can give no opinion concerning the current utility of the information which is clearly very old. In addition, the statistical information compiled related to income and assets of family units, not individual recipients. The 1965 statistics indicate that the mean income of the family unit of a disabled worker was $3,803.00. The median income for a similar grouping was $2,836.00. The mean financial assets of disabled workers' family units was $4,862.00; the median for a similar group was $940.00. For purposes of the study, financial assets were defined as liquid assets, such as cash in banks, credit unions, and similar institutions, and United States Savings Bonds at face value; the market value of stocks, bonds or shares in mutual funds; and amounts due from loans to other people.

We hope that this information will be satisfactory. If we may be of further assistance, please advise us.

Sincerely yours,
FRANK L. DELL'ACQUA
By THOMAS W. STOUT
Thomas W. Stout
Attorney

Supreme Court, U. S.
FILED
MAY 12 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 74-204

GEORGE H. ELDRIDGE,

Respondent

v.

CASPAR WEINBERGER,

Secretary of Health,
Education & Welfare,

Petitioner

David A. Webster
153 Pryor Street, S.W.
Atlanta, Georgia 30303

Counsel for Amicus Curiae

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IN THE
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GEORGE H. ELDRIDGE,

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Secretary of Health,
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Petitioner

BRIEF OF AMICUS CURIAE CAROLINE WILLIAMS

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ATTORNEY FOR AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Carolina Williams in this case arises from the fact that she is the Respondent in Weinberger v. Williams, No. 74-205, in this Court, in which Secretary Weinberger has filed his petition for certiorari to the United States Court of Appeals for the Fifth Circuit. The Williams case raises the same issue presented in this case, i.e. whether Social Security beneficiaries must be afforded the opportunity for an evidentiary hearing prior to termination of disability benefits pursuant to §223 of the Social Security Act. Caroline Williams has also participated as amicus curiae in the Eldridge litigation before the United States Court of Appeals for the Fourth Circuit.

PRELIMINARY STATEMENT

Amicus curiae does not dispute any of the preliminary matters in Appellant's brief, including its statement of facts.

SUMMARY OF ARGUMENT

The due process clause of the Fifth Amendment, when all factors are weighed in the balance, requires an opportunity for oral evidentiary hearing prior to termination of Social Security disability benefits when there is a dispute over cessation of disability. These benefits are a terribly important source of income for recipients, and under the current system, benefits are lost for an unconscionably long period of time pending decision after evidentiary hearing. The risk of error absent a prior evidentiary hearing justifies a requirement that just such a hearing be provided. Finally,

no governmental interest outweighs the recipient interest in prior evidentiary hearings.

I. SOCIAL SECURITY DISABILITY BENEFITS ARE A VITALLY IMPORTANT INTEREST FOR RECIPIENTS OF THOSE BENEFITS.

Amicus believes that the instant case is controlled by Goldberg v. Kelly, 397 U.S. 254 (1970), which required the opportunity for an oral evidentiary hearing prior to termination of public assistance (welfare) benefits. Appellant attempts to distinguish the instant case from Goldberg on the ground that the welfare benefits there involved were the recipient's last resort source of income, while Social Security benefits are given regardless of need (Br. at 38).

By way of response, it is first worth noting that this Court since Goldberg has extended due process protections,

including the requirement of a prior oral hearing, to many rights and benefits which do not amount to necessities. See e.g., Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971). In Bell v. Burson, in fact, the Court specifically rejected the argument that only deprivation of necessities gives rise to the need for procedural due process guarantees. 402 U.S. at 539.

Moreover, in striking the due process balance, the Court should be mindful that Social Security benefit payments are in fact the mainstay of millions of family budgets. Despite the assertion of the Secretary's attorneys that Social Security beneficiaries would not be needy without their checks, the Secretary's own procedural manual states precisely to the contrary. The very first sentence of that Manual, reprinted in Appendix "C" to the Secretary's Petition for Certiorari, states:

> Most people who get a social security check depend on it for the necessities of life.

Eldridge Petition at 20A. Thus, this case is virtually indistinguishable from Goldberg as to the recipient interest to be protected.[1]

Finally, one very important consideration in weighing the recipient's interest in prior evidentiary hearings is the length of time it takes after termination to obtain a hearing decision to correct any error. As

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[1] Even though Social Security disability benefits are not the program of last resort in that they are not based on need, denial of Social Security benefits may be tantamount to denial of benefits based on need also. On January 1, 1974, the federal government began a program called Supplemental Security Income (SSI) which superseded the old state welfare programs for adults, including the program of aid for the disabled. 42 U.S.C. §§1381-1383. The disability test for SSI requires that an individual be "unable to engage in any substantial gainful activity," 42 U.S.C. §1382c(A)(3), precisely the same test used in the Social Security program. 42 U.S.C. §416(i). Thus, a finding of nondisability for Social Security (OASDI) purposes is also a finding of nondisability for SSI purposes, and precludes the payment of benefits based on need also.

this Court stated in the recent case of Fusari v. Steinberg, _____ U.S. _____, 42 L. Ed. 2d 521 (1975):

> Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected by official action ...[T]he possible length of wrongful deprivation of .., benefits is an important factor in assessing the impact of official action on the private interests ... [T]he rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process.

42 L. Ed. 2d at 529. In the case at bar, the Secretary has provided the Court with stunning and hitherto unavailable statistics on the current lag between hearing request and hearing decision. In his brief, at pages 30 and 51, the Secretary admits that this delay now amounts to between ten and eleven months.[2] During that entire period, the

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[2] Even this figure does not take into account the further delay to allow the Appeals Council to determine whether or not to review the hearing decision on its own motion, and the mechanical process of getting out the first renewed check. In summary, it appears likely that the termination of benefits pending a hearing decision currently results in the delay of at least a year in payment of benefits.

recipient who is wrongfully terminated will have to suffer without his income substitute from Social Security until a reversal after hearing can be effected.

Amicus concludes that the recipient's interest in his Social Security disability benefits, especially in view of the length of deprivation before hearing decision, is of very heavy weight in the due process balance.

II. THE SIGNIFICANT RISK OF ERROR ABSENT SUCH PROCEDURES JUSTIFIES THE REQUIREMENT OF OPPORTUNITY FOR A PRIOR EVIDENTIARY HEARING.

The Secretary contends that the risk of error in his "paper hearing" scheme is minimal, and that the opportunity for a prior evidentiary hearing is therefore not required as a matter of due process. The Secretary attempts to mask the importance of the evidentiary hearing by pointing out that only 15% of all initial determinations of

cessation of disability are reversed, and that most of those reversals occur at the state of reconsideration, or "paper hearing." (Br. at 32, 43).

The most important statistic for purposes of this case is found on page 31 of the Secretary's brief. There the Secretary reports that of those who requested reconsideration of the issue of their disability, were denied, and requested a hearing, fully 40-50% obtained reversals of the initial finding of nondisability. This substantial risk of error compels the conclusion that the prior evidentiary hearing is such an important procedural

protection as to be a required part of due process.[3]

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[3] The Secretary's point in using his statistics appears to be that the reconsideration stage as currently structured is sufficient to catch most initial errors in cessation determinations. His argument has a further and unarticulated step, namely that in view of the gross statistics on the success of the paper reconsideration stage, a requirement or oral hearing opportunity for all recipients threatened with termination is unwarranted. Amicus would not suggest that the Secretary must necessarily abolish the paper reconsideration stage and extend the hearing requirement to all cases. An effective alternative, consonant with due process, and probably cheaper, would be to keep the present paper reconsideration stage and offer the opportunity for prior evidentiary hearing to recipients still threatened with termination after this stage. See also Part III, infra.

The Secretary also attempts to minimize the importance of the risk of error by arguing that this case is distinguishable from Goldberg as to the importance of oral hearing to the recipient. The Secretary contends, first, that disability decisions are merely a matter of written "medical" evidence, and that such written reports are largely reliable (Br. at 40-41); and second, that Social Security recipients are better able than are welfare recipients to cope with the demands of a written submission system. (Br. at 40-41). Amicus would suggest that the 40-50% reversal rate after oral hearing is enough to suggest the error of these contentions. But she will also show that each of these arguments taken separately is wide of the mark.

A. The Nature of Disability Issues Requires Opportunity for Oral Evidentiary Hearing.

Even if it were true that all disability

determinations were predicated upon a cessation of disability alone,[4] it would not follow that the issues could be decided solely on the basis of written submissions. Cf. Morrissey v. Brewer, 408 U.S. 471 (1972).

The Secretary cites this Court's opinion in Richardson v. Perales, 402 U.S. 389 (1971) for the proposition that written doctor's reports are inherently reliable. The Secretary's analysis of Perales is correct as far as it goes, but it falls short of a complete analysis of that case. Perales merely held that

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4 The regulations also provide for termination for failure to cooperate, without good cause, where disability is in issue. 20 C.F.R. §404.1539(c). This standard creates factual issues precisely parallel to those raised by the termination of one of the welfare recipients in Goldberg.

physicians' reports have enough reliability that they may be admitted into evidence and may serve as substantial evidence to support a decision adverse to the claimant. Perales falls several steps short of the argument that the Secretary makes, however. Perales does not stand for the proposition that a written report is an adequate substitute for oral testimony where the claimant feels the need to subpoena and cross-examine a doctor.[5] Nor does Perales exclude the possibility of valuable oral testimony in addition to the written doctor's reports, testimony which in combination with the written medical evidence may establish disability.

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5 In fact, Perales specifically notes that the claimant has the right under 20 C.F.R. §404.926 to subpoena physicians to hearing if he so desires. 20 U.S. at 404, 407. Perales also specifically reserves the issue here presented 402 U.S. at 407.

Several recent cases have established exactly this second proposition, that oral testimony by the claimant and other lay witnesses may greatly supplement the dry medical reports and add the personal insight which establishes disability. This testimony may cover such important items in the disability equation as the claimant's subjective symptons, his endurance, and his ability to engage in day-to-day activities. A typical statement of the importance of this evidence is found in DePaepe v. Richardson, 464 F. 2d 92 (5th Cir. 1972):

> [T]here are four elements of proof to be considered in determining whether a claimant is disabled within the meaning of the Social Security Act, and these are: (1) objective medical facts or clinical findings; (2) diagnoses of examining physicians; (3) subjective evidence of pain and disability as testified to my members of his family, his neighbors and others who have observed him; and (4) the claimant's age, education and work history .... It is obvious that all of these elements of proof must be considered together and in combination with each other, and not just one or two with the others excluded.

Id. at 94. [Emphasis in original]. Lay testimony in particular is a vital consideration in the determination and should not be disregarded. Id. at 99-100. Accord, Underwood v. Ribicoff, 298 F. 2d 850 (4th Cir. 1962). Other Circuits have apparently placed even more reliance on subjective testimony. See e.g., Bittel v. Richardson, 441 F. 2d 1193 (3rd Cir. 1971).

The vital role of subjective testimony in disability determinations serves to underscore the importance of oral hearings. The administrative law judge performs two important functions in the hearing decision process which are not served by reliance

on written reports alone: first, he "eyeballs" the claimant and other witnesses, and makes a first-hand judgment as to their veracity and the credibility of their statements as to the claimant's impairment and residual capacities; second, he weighs the impressions he has gained from this testimony against the objective medical evidence of record to get a holistic picture of the claimant's functional abilities.

The salutary effect for claimants of an oral hearing on the disability termination issue is illustrated by the remarkable figures showing a high percentage of reversals after hearing, as discussed above. Opportunity for such a hearing is a vital opportunity for recipients to complete the record on the issue of disability.

B. Oral Hearing is a Vital Procedural Safeguard for Disability Recipients.

Petitioner also contends that this case is distinguishable from Goldberg in that Social Security recipients are more capable than are welfare recipients of expressing themselves in written submissions. This contention is inconsistent with the very definition of disability. Since the disabled are those who are unable to adjust to their physical and emotional problems in the light of their "age, education and work experience," 42 U.S.C. §423(d)(2)(A), this group includes a disproportionate number of the uneducated, unlettered and incompetent who are illequipped to cope with the demands of a written and highly verbal system. For this group, the words of Goldberg sound ringingly true:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decisionmaker in writing or second hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important.

397 U.S. at 268-69. Like welfare recipients, Social Security disability beneficiaries need the opportunity for a prompt oral hearing in order to present their case with full effectiveness.

The figures quoted by the Secretary at page 42, fn. 46 of his brief, do not undercut this analysis. Even though Social Security recipients undeniably have received a measurable amount of schooling, they are by definition a group that

have been unable to turn their skills to useful work. One of the skills lacking in a high proportion of these individuals is unquestionably the same ability to communicate on paper that was found missing in welfare recipients in Goldberg and in its companion case, Wheeler v. Montgomery, 397 U.S. 280 (1970), where this Court invalidated a paper hearing scheme for welfare recipients.

When the Secretary indicates that reversals after hearing often occur because of the submission of new evidence or because of the application of an informed judgment to the facts (Br. at 12, 43), he is calling attention to two of the very factors that make a prior evidentiary hearing so important. Only in an evidentiary hearing will many recipeints be made fully aware of the kinds of evidence they must submit in order to establish

their disability; and only in such a confrontation situation can the decider make a complete judgment about the unique characteristics of an individual recipient which make him continuingly disabled despite apparent "medical" evidence to the contrary. Amicus concludes that a prior evidentiary hearing is as important an additional protection here as it was to the parolee in Morrissey v. Brewer, 408 U.S. 471 (1972), or the welfare recipients in Goldberg and Montgomery.

III. NO ARGUMENT FROM ADMINISTRATIVE CONVENIENCE JUSTIFIES THE SECRETARY'S FAILURE TO PROVIDE THE OPPORTUNITY FOR PRIOR ORAL HEARING.

The Secretary urges that evidentiary hearings should not be required prior to termination of benefits because of alleged

administrative problems in administering such a program. The whole argument, essentially, boils down to a contention that prior hearings would be too costly to be worthwhile.

First of all, it should be noted that this Court has not yet refused prior evidentiary hearings for reasons of cost alone. In each case in which termination procedures were found sufficient without prior evidentiary hearings, other state interests than money added to the balance. For example, in Goss v. Lopez, ___ U.S. ___, 42 L. Ed. 2d 725 (1975), this Court approved suspensions from school for less than ten days without formal hearing because of the need to remove a disturbing influence quickly and summarily from the school. In Arnett v. Kennedy, 416 U.S. 134 (1974), where the Court might

have relied on similar needs in job situations, the plurality opinion instead held that the procedural rights of a fired federal employee were expressly limited by the rights given him by statute. In Wolff v. McDonnell, ___ U.S. ___, 41 L. Ed. 2d 935 (1974), the Court held rights of confrontation and cross-examination not required in proceedings for the suspension of good time credit, where such procedures might interfere with prison discipline.

In this case, a requirement of a prior oral hearing would not interfere with any other governmental interest, as in the cases above. In fact, the only interest of the government here, apart from the fiscal one, dovetails perfectly with that of the recipient. The government has, after all, an interest in seeing that all eligible recipients are

paid in accord with the purposes of the Social Security program. As this Court struck the balance in Goldberg:

> Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

397 U.S. at 266.

Furthermore, Amicus would suggest that the cost of a prior oral hearing requirement is not as great as the Secretary would suggest. As Amicus has suggested, supra, n. 3, the only aspect of the Secretary's procedure that needs to be changed in order to comply with due process requirements is to defer termination until after hearing decision, rather than terminating immediately after reconsideration, as at present. Since

the hearing and other administrative costs are presumably the same whether the hearing is conducted before or after termination, the only additional cost of the prior hearing requirement is the unrecoupable portion of the benefits paid pending a hearing to that portion of the recipients who turn out to be ineligible after appeal.

Moreover, even these costs are not outside the Secretary's control. Again, as this Court explained with regard to such expenses in Goldberg:

> But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

Id.[6] Thus, even the inevitable cost increase which will result from a prior evidentiary hearing requirement can be kept to a minimum with quick hearings and proper planning.

Given that some costs will increase but that no other interests of the federal

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[6] As the Secretary notes, Br. at 52-53, acceleration of hearings for recipients threatened with termination may have the short-run effect of delaying hearings for some new applicants appealing from denials of initial applications. Although this is obviously not an easy short-run choice, Amicus would suggest that it is a necessary choice because of the expectations built up in recipients by and in continuing receipt of their checks. In the long run, the Secretary will have to do something about the size of his hearing staff. Amicus is frankly appalled that the Secretary intends to cut back on the number of his administrative law judges (Br. at 50, fn. 58) in a period of increasing applications, when the time lag from hearing request to hearing decision is already some ten or eleven months.

government will be infringed upon, the balance to be struck is clear.

> A prior hearing always imposes some cost in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See Bell v. Burson, supra, at 540-541; Goldberg v. Kelly, supra, at 261. Procedural due process is not intended to promote all possible interests, it is intended to protect the particular interests of the person whose possessions are about to be taken.

Fuentes v. Shevin, 407 U.S. 67 at 90 n. 22 (1972).

On an even higher plane, this Court has said;

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the

> Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

In short, protestations of increased cost cannot control this case, and for the reasons stated above, disability recipients should be afforded the opportunity for oral hearing prior to termination.

CONCLUSION

Social Security disability benefits are a budget mainstay for those who receive them. Under current procedures, delay from hearing request to hearing decision is unconscionably long. In 40 to 50 per cent of disability cases

which go to hearing, initial decisions against the recipient are reversed. The evidentiary hearing is important to the recipient because of the opportunities it gives to the administrative law judge to consider subjective evidence, and to the recipient to tailor his argument to the administrative law judge's concerns. Finally, no other administrative problems other than cost mitigate against a prior oral hearing requirement here; neither cost in general nor the specific costs of evidentiary hearing in this context are sufficient to out-weigh the need of recipients of disability benefits for prior hearing.

DAVID A. WEBSTER
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with air mail postage prepaid, and addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Donald Earls
Professional Arts Building
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This the ____ day of _____,
1975.

DAVID A. WEBSTER
Attorney for Amicus Curiae

Supreme Court, U. S.
FILED
NOV 3 1975
MICHAEL RODAK, JR., CLERK

No. 74-204

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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We contended for the first time in our supplemental and reply brief, at pages 3-10, that the district court lacked jurisdiction to hear this case. We here reply to the contrary contention made by respondent in his supplemental brief.

1. We begin with the proposition that Section 205 (h) of the Social Security Act, 42 U.S.C. 405(h), precluded the district court from asserting jurisdiction over respondent's complaint "save as [jurisdic-

tion may have been] provided [by Section 205(g) of] the Act." *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op., p. 6.

The second sentence of Section 205(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided", *i.e.*, except as provided by Section 205(g). That sentence governs the jurisdictional issue in this case, for it is clear beyond debate that respondent's suit seeks review of a "decision" of the Secretary. The parties are in disagreement over what that "decision" is: in our view, the decision with respect to which review is sought is the Secretary's termination of respondent's disability benefits; respondent appears to claim (Resp. Supp. Br. 1-4) that the decision subject to review is the Secretary's promulgation of regulations providing for termination of benefits without a prior oral hearing. We discuss the significance of that disagreement below (pp. 4-6, *infra*). But under either party's construction of the jurisdictional facts, respondent sought review of a "decision of the Secretary" within the meaning of the second sentence of Section 205(h), and therefore the district court's jurisdiction to review that decision was subject to the limitations imposed by Section 205(g).

Respondent contends (Resp. Supp. Br. 8-11, 14-16) that Section 205(g) does not provide the exclusive jurisdictional basis for review of Social Security cases and that the district court possessed jurisdiction under the mandamus statute, 28 U.S.C. 1361,

or the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.* We have already answered the substance of that contention at pages 13-18 of our brief in *Norton* v. *Mathews*, No. 74-6212, question of jurisdiction postponed to the hearing on the merits, June 30, 1975, where we showed that Section 205(h) forecloses all jurisdictional bases other than that provided by Section 205(g).[1] We rely upon that discussion here. We add only that respondent's argument with regard to the availability of mandamus or APA jurisdiction is based upon the claim that the *third* sentence of Section 205(h) does not preclude such jurisdiction,[2] whereas respondent's action (unlike the suit on behalf of the unnamed class members in *Norton*, which apparently was brought before those members had even presented their claims to the Secretary) seeks review of a "decision of the Secretary" and therefore is governed as well by the *second* sentence of Section 205(h), which explicitly precludes such review except as provided by Section 205(g). Accordingly, no matter how the claim of mandamus or APA jurisdiction is resolved in *Norton*, jurisdiction here exists, if at all, only under Section 205(g).

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[1] A copy of our brief in *Norton* is being furnished to respondent's counsel.

[2] The third sentence of Section 205(h) provides:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [Section 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act].

Respondent's action, which seeks reinstatement of disability insurance benefits allegedly due him under Title II of the Act, is subject to the limitations imposed by that sentence.

2. Respondent's suit did not meet the jurisdictional requirements of Section 205(g). That provision grants the federal district courts jurisdiction to review "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party," upon commencement by the plaintiff of "a civil action * * * within sixty days after the mailing to him of notice of such decision * * *." In this case there was no "final decision of the Secretary." As we explained at pages 5-8 of our supplemental and reply brief, the Secretary's order terminating respondent's disability benefits was subject to administrative review, which respondent did not seek.[3] Accordingly, it was not subject to judicial review under Section 205(g).

Respondent's contrary argument (Resp. Supp. Br. 1-6) appears to be that the "final decision of the Secretary" subject to review in this case is the Secretary's promulgation of regulations providing for the termination of disability benefits without a prior oral hearing, that that decision has been acknowledged by the Secretary to be "final," and that a decision so acknowledged to be final is subject to review under Section 205(g) whether or not "made after a hearing." That syllogism falls with its major premise. The decision of the Secretary sought to be reviewed here is not his promulgation of regulations but rather the specific termination of respondent's own disability benefits. This is made plain by respondent's complaint. The relief respondent seeks is not a declaration of the invalidity of the Secretary's regulation, or an injunction restraining its enforcement, but rather that the Secretary's decision terminating respondent's disability benefits be vacated and the Secretary "commanded to immediately transmit unto * * * [respondent] * * * the disability benefits checks for the month of August, 1972 and all subsequent months thereafter until * * * [respondent] is afforded a hearing" (A. 3).

Moreover, the Secretary's procedural regulations would not have been subjected to pre-exhaustion judicial review even if respondent had requested broad declaratory or injunctive relief. Section 205(g) provides for review of the validity of the Secretary's regulations only in connection with review of the propriety of final actions taken by the Secretary with respect to a particular claimant or claimants. Respondent's contrary argument—that the district courts possess Section 205(g) jurisdiction over suits challenging the validity of the Secretary's regulations, on the theory that the regulations represent "final decision[s] of the Secretary," whether or not the

[3] At oral argument in this case on October 6, 1975, respondent's counsel stated that respondent had sought administrative reconsideration of the Secretary's order terminating payment of benefits. We are informed by the Social Security Administration that respondent made no such request. We are further informed, however, that on February 5, 1973, after expiration of time for filing a request for reconsideration, respondent filed a new application for benefits, which has not been acted upon, apparently because of the pendency of this litigation and the district court's unstayed order that respondent's benefit payments be continued.

plaintiffs' administrative claims had been subject to a final administrative decision or, indeed, any decision at all—is at cross-purposes with both the statutory language and the evident legislative intent. As we demonstrated in our brief in *Norton*, Congress intended to provide, and has provided, only for case-by-case review of individual claims, after the individual has exhausted his administrative remedies. The legislative intent is manifested, *inter alia*, by Section 205(g)'s requirements that the "final decision" sought to be reviewed have been made "after a hearing to which [the plaintiff] was a party" and that the suit be brought "within sixty days after the mailing to [the plaintiff] of notice of such decision * * *." Those requirements can be met only by a claimant who seeks review of a decision denying a specific claim for benefits. They could not be met by an individual seeking review of the Secretary's decision to promulgate regulations, for the individual would not be a "party" to a hearing on proposed regulations, nor would he be mailed a notice of the Secretary's decision to promulgate the proposed regulations. In short, in enacting Section 205(g), Congress quite clearly was concerned only with establishing an orderly means of securing post-exhaustion judicial review of individual claims, not with establishing a mechanism for premature and possibly unnecessary judicial review of the constitutional adequacy of the Secretary's procedures where, as here, subsequent administrative review might have remedied the alleged injury by resulting in the award of back benefits for the period affected by the termination order.

3. Application here of the strict jurisdictional requirements of Section 205(g) need not operate to foreclose later judicial consideration of the constitutional issue respondent seeks to litigate. Respondent's repeated assertions to the contrary (Resp. Supp. Br. 7, 11-14) overlook the fact that, as we explained at pages 8-10 of our supplemental and reply brief, a district court would have ample power to adjudicate that issue upon post-exhaustion review of a final decision by the Secretary.[4]

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[4] Respondent appears to argue (Resp. Supp. Br. 3-4, n. 3) that pre-exhaustion review would be preferable as a "[j]urisprudential" matter. That argument is based upon the factual misconception that adjudication upon post-exhaustion review would involve "a prospective, declaratory judgment case, rather than * * * a situation in which the asserted injury has already occurred" (*ibid.*). Post-exhaustion review in fact would necessarily involve "a situation in which the asserted injury has already occurred." But respondent's argument is also jurisprudentially misconceived, for the underlying jurisprudential concern here—that of avoiding premature and possibly unnecessary adjudication of difficult constitutional questions—in fact strongly militates against granting the pre-exhaustion review respondent seeks. But, at bottom, the decision on the jurisdictional issue in this case should turn not upon asserted jurisprudential concerns but upon the language of the jurisdictional statute and Congress' intent in enacting it, which, as we have shown, preclude the premature review respondent seeks.

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